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INDEX

TO THE

MISCELLANEOUS DOCUMENTS

OF THE

HOUSE OF REPRESENTATIVES

FOR THE

SECOND SESSION OF THE FORTY-SEVENTH CONGRESS.

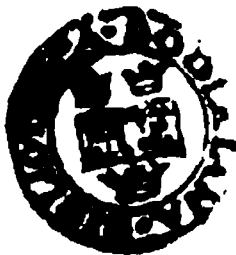
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INDEX TO HOUSE MISCELLANEOUS DOCUMENTS.

CONTENTS OF THE VOLUMES.

VOL. 1..Nos. 1 to 18 inclusive, except Nos. 6 and 9.	VOL. 10..No. 37.
VOL. 2..No. 6, part 1.	VOL. 11..Nos. 39 and 40.
VOL. 3..No. 6, part 2.	VOL. 12..No. 41.
VOL. 4..Nos. 19 to 38 inclusive, except Nos. 26, 27, 28, 30, 31, 32, 33, 34, 35, and 37.	VOL. 13..No. 42. Reports of the Tenth Census.
VOL. 5..No. 26.	VOL. 14..No. 43.
VOL. 6..No. 27.	VOL. 15..No. 44.
VOL. 7..No. 28.	VOL. 16..No. 45, part 1.
VOL. 8..Nos. 30, 31, 32, 33, and 34.	VOL. 17..No. 45, part 2.
VOL. 9..No. 35.	VOL. 18..No. 45, part 3.
	VOL. 19..No. 45, part 4.



INDEX TO THE DOCUMENTS.

Subject.	Vol.	No.	Part.
A.			
Alabama, testimony in the contested-election case of John W. Jones vs. Charles M. Shelley, from the fourth district of the State of.....	4	21	
Ames, J. G., communication from, <i>et al.</i> , relative to publication and distribution of public documents.....	1	12	
Appropriations, new offices, &c., list of, made during the second session of the Forty-seventh Congress.....	4	36	
Appropriations, letter from the Commissioners of the District of Columbia, transmitting estimates of. (See H. Ex. Doc., Vol. 17.)	.....	9	
B.			
Baird, Spencer F., Secretary of the Smithsonian Institution, communication from, <i>et al.</i> , relative to publication and distribution of public documents.....	1	12	
Bullion certificates, remarks of Hon. H. C. Burchard, Director of the United States Mint, in relation to	4	22	
Burchard, Hon. H. C., Director of the United States Mint, remarks of, in relation to bullion certificates.....	4	22	
C.			
Census, reports of the Tenth.....	13	42*	
Centennial, letter from the Secretary of the Smithsonian Institution relative to the exhibit of the United States executive departments at the	4	20	
Claims, Court of:			
Statement of judgments rendered by the, for year ending December 3, 1881.....	1	5	
Statement of judgments rendered by the, for year ending December 3, 1882.....	4	52	

* And parts.

Subject.	Vol.	No.	Part.
Clerk of the House of Representatives. report of expenditures by the, from December 5, 1881, to June 30, 1882	1	11	
Commercial Relations, reports from the Consuls of the United States on the commerce, manufacture, &c., of their consular districts	11	39	
Commissioners of the General Land-Office, letter from the, relating to railroads not completed within the time fixed by law	1	17	
Commissioners of the District of Columbia, letter from the, transmitting estimates of appropriations. (See Ex. Doc., Vol. 17.)		9	
Committees, list of standing and select	1	2	
Congress, list of reports made to	1	4	
Consular reports	4	19	
Consuls of the United States, reports from the, on the commerce, manufactures, &c., of their consular districts	11	39	
Contested elections:			
Digest of cases of, with index	9	35	
Testimony in the case of John W. Jones vs. Charles M. Shelley, from the fourth district of the State of Alabama	4	20	
Court of Claims:			
Statement of judgments rendered by the, for year ending December 3, 1881	1	5	
Statement of judgments rendered by the, for year ending December 3, 1882	4	25	
D.			
Decisions, rendered by the First Comptroller of the Treasury.	10	37	
District of Columbia, letter from the Commissioners of the, transmitting estimates of appropriations for the. (See Ex. Doc., Vol. 17.)		9	
Documents:			
Letter from the Doorkeeper of the House of Representatives, transmitting a list of, in the folding-room of the House	1	7	
Letter from J. G. Ames, Spencer F. Baird, and A. R. Spofford, relative to the publication and distribution of	1	12	
Doorkeeper of the House of Representatives:			
Letter from the, transmitting a list of documents in the folding-room of the House	1	7	
Inventory of public property in charge of the	1	7	
E.			
Elections:			
Testimony in contested case of John W. Jones vs. Charles M. Shelley, from the fourth district of Alabama	4	21	
Digest of cases of contested, with index of same	9	35	
Entomological Commission, third report of the	15	44	
Eulogies:			
Upon the life and services of Hon. William M. Lowe, deceased	8	30	
Upon the life and services of Hon. J. T. Updegraff, deceased	8	31	
Upon the life and services of Hon. Godlove S. Orth, deceased	8	32	
Upon the life and services of Hon. R. M. A. Hawk, deceased	8	33	
Upon the life and services of Hon. John W. Shackelford, deceased	8	34	
Expenditures, letter from the Clerk of the House of Representatives, transmitting a report of the, of the House from December 5, 1881, to June 30, 1882	1	11	

Subject.	Vol.	No.	Part.
F.			
First Comptroller of the Treasury:			
Letter from the, transmitting a report of the expenses of the illness and death of James A. Garfield, late President of the United States	1	14	
Decisions rendered by the, with appendix (Vol. III, 1882) ..	10	37	
Fish Commission, bulletin of the United States (Vol. II, 1882) ..	11	40	
Folding-room of the House of Representatives, list of documents in the	1	7	
G.			
Garfield, James A., letter from the First Comptroller of the Treasury, transmitting a report of the expenses of the illness and death of, late President of the United States	1	14	
General Land Office, letter from the Commissioner of the, relating to railroads not completed within the time fixed by law	1	17	
Geological Survey:			
Bulletin of the, of the United States	1	16	
Monographs of the, of the United States, Vol. VI	14	43	
H.			
Hawk, Hon. R. M. A., eulogies upon the life and services of, late a member of the House of Representatives from the fifth district of the State of Illinois	8	33	
House of Representatives:			
Letter from the Clerk of the, transmitting a report of the expenditures of the, from December 5, 1881, to June 30, 1882	1	11	
List of members of the, arranged by States	1	1	
List of members of the, arranged alphabetically, showing the committees of which they are members	1	3	
List of standing and select committees of the	1	2	
I.			
Illinois, eulogies upon the life and services of Hon. R. M. A. Hawk, late a member of the House of Representatives from the fifth district of the State of	8	33	
Indiana, eulogies upon the life and services of Hon. Godlove S. Orth, late a member of the House of Representatives from the ninth district of the State of	8	32	
Indians, memorial of the Creek Nation of, relating to the allotment of lands in severalty	1	18	
Interior Department:			
Bulletin of the United States geological survey, from the	1	16	
Letter from J. G. Ames, superintendent of documents of the, <i>et al.</i> , relative to the publication and distribution of public documents	1	12	
Reports of the Tenth Census	13	42	
J.			
Judgments:			
List of, rendered by the Court of Claims for the year ending December 3, 1881	1	5	
List of, rendered by the Court of Claims for the year ending December 3, 1882	4	25	
L.			
Lands, public, existing laws of the United States, of a general and permanent character, and relating to the survey and disposition of the. (H. R. Ex. Doc. 47, Forty-sixth Congress, third session)	16	45	1

Subject.	Vol.	No.	Part.
Laws, the existing, of the United States, of a general and permanent character, and relating to the survey and disposition of the public domain. (H. R. Ex. Doc. 47, part 1, Forty-sixth Congress, third session).....	16	45	1
Librarian of Congress, letter from A. R. Spofford, the, <i>et al.</i> , relative to the publication and distribution of documents	1	12	
List of appropriations for new offices, &c.....	4	36	
List of members of the House of Representatives, arranged by States.....	1	1	
List of members of the House of Representatives, arranged alphabetically, showing the committees of which they are members.....	1	3	
List of reports made to Congress.....	1	4	
List of standing and select committees of the House of Representatives	1	2	
Lowe, Hon. William M., eulogies upon the life and services of, late a member of the House of Representatives from the eighth district of Alabama.....	8	30	
M.			
Memorial of the Creek Nation of Indians, relating to the allotment of lands in severalty.....	1	18	
Memorial of the Tice Manufacturing Company	1	8	
Military Academy, report of the Board of Visitors to the, for year 1882	4	24	
Military district, the Virginia, in Ohio, papers designed to illustrate the necessity for the passage of bill H. R. 7015, relating to the	1	10	
Mint, remarks of Hon. N. C. Burchard, Director of the United States, relative to bullion certificates	4	22	
Monographs, of the United States Geographical Survey (Vol. VI).....	14	43	
N.			
National Soldiers' Home, letter from the Board of Managers of the, transmitting the annual report of the operations of the, for the fiscal year ending June 30, 1882.....	1	13	
New offices, appropriations, &c., list of, made during the second session of the Forty-seventh Congress	4	36	
North Carolina, eulogies upon the life and services of Hon. John W. Shackelford, late a member of the House of Representatives from the third district of the State of.....	8	34	
O.			
Offices, new, appropriations, &c., list of, made during the second session of the Forty-seventh Congress.....	4	36	
Ohio, Virginia military district in: Papers designed to show the necessity for the passage of bill H. R. 7015, relating to the.....	1	10	
Eulogies upon the life and services of Hon. J. T. Updegraff, late a member of the House of Representatives from the sixteenth district of the State of.....	8	31	
Order, questions of, raised and decided in Committee of the Whole House on general appropriation and revenue bills..	4	38	
Orth, Hon. Godlove S., eulogies upon the life and services of, late a member of the House of Representatives from the ninth district of the State of Indiana	8	32	
P.			
Population, statistics of the, of the United States at the Tenth Census	13	42	

Subject.		No.	Part.
Public property, letter from the Doorkeeper of the House of Representatives transmitting an inventory of, in the folding-room of the House.....	1	7	
Questions of order, raised and decided in Committee of the Whole House on general appropriation and revenue bills..	4	35	
R.			
Railroads, letter from the Commissioner of the General Land Office, transmitting a report of, not completed within the time fixed by law.....	1	17	
Rebellion, War of the. (Series 1, vol. 8.).....	6	27	
Rebellion, War of the. (Series 1, vol. 9.).....	12	41	
Reports:			
Of the Tenth Census.....	13	42	
Consular.....	4	19	
First Comptroller of the Treasury, of expenses of the illness and death of James A. Garfield, late President of the United States.....	1	14	
List of, made to Congress.....	1	4	
Of Tariff Commission.....	2, 3	6	1, 2, 3, 4, 5
Of the Clerk of the House of Representatives, of expenditures by him from December 5, 1881, to June 30, 1882..	1	11	
Of the Smithsonian Institution.....	5	26	
Of Board of Visitors to the United States Military Academy for year 1882.....	4	24	
Rivers and Harbors, letter from the Secretary of War relative to certain works on.....	1	15	
S.			
Shackelford, Hon. John W., eulogies upon the life and services of, late a member of the House of Representatives from the third district of the State of North Carolina.....	8	34	
Smithsonian Institution:			
Letter from Spencer F. Baird, Secretary of the, relative to the publication and distribution of public documents.	1	12	
Letter from the Secretary of the, relative to the exhibit of the United States at the Centennial Exhibition.....	4	20	
Annual Report of the.....	5	26	
Soldiers' Home, letter from the board of managers of the National, transmitting the annual report of the operations of the, for fiscal year ending June 30, 1882.....	1	13	
Spofford, A. R., Librarian of Congress, letter from, <i>et al.</i> , relative to the publication and distribution of public documents.....	1	12	
T.			
Tariff, relating to manufactured articles subject to duty.....	4	29	
Tariff Commission, report of the.....	2, 3	6	1, 2, 3, 4, 5
Tice Manufacturing Company, memorial of the.....	1	8	
Treasury:			
Letter from the First Comptroller of the, transmitting a report of the expenses of the illness and death of James A. Garfield, late President of the United States.....	1	14	
Decisions of the First Comptroller of the, with appendix. (Vol. III, 1882.).....	10	37	
U.			
Updegraff, Hon. J. T., eulogies upon the life and services of, late a member of the House of Representatives from the sixteenth district of the State of Ohio.....	8	31	

Subject.	Vol.	No.	Part.
.V.			
Virginia military district in Ohio, papers designed to illustrate the necessity for the passage of bill H. R. 7015 relating to the.....	1	10	
W.			
War of the Rebellion. (Series 1, vol. 8.)	6	27	
War of the Rebellion. (Series 1, vol. 9.)	12	41	
War, Secretary of, letter from the, relative to certain works on rivers and harbors	1	15	

DECISIONS

OF THE

FIRST COMPTROLLER

IN THE

DEPARTMENT OF THE TREASURY

OF

THE UNITED STATES;

WITH

AN APPENDIX.

By WILLIAM LAWRENCE,
FIRST COMPTROLLER.

VOL. III—1882.

WASHINGTON:
GOVERNMENT PRINTING OFFICE.
1882.

ERRATA.

In "Exigency Case," at p. 93, fourth line from the top, the syllabus should read, "July 2, 1881," instead of "July 2, 1882."

In "Utah District Attorney's Case," at p. 119, the syllabus, division "3," subdivision "(1)," should read, "He is entitled to an annual salary of \$250," instead of "He is not entitled to an annual salary of \$250."

"Walsh's Case," at p. 124, twenty-third line from the top, should read, "one year after the date of the drafts to Walsh," instead of "the day prior to the date of the drafts to Walsh."

"Yorktown Centennial Case," at p. 148, twenty-fourth line from the top, should read "*quantum valebat*" instead of "*quantum valebant*."

CONTENTS.

- I. ERRATA.
- II. JOINT RESOLUTION REQUIRING THE PUBLIC PRINTER TO PUBLISH CERTAIN DECISIONS OF THE FIRST COMPTROLLER OF THE TREASURY DEPARTMENT.
- III. ACT PROVIDING FOR PUBLICATION OF THE REVISED STATUTES AND THE LAWS OF THE UNITED STATES, SECTION 7.
- IV. TABLE OF CASES.
- V. TABLE OF CLAIMANTS.
- VI. TABLE OF CASES AND SUBJECTS IN THEIR RESPECTIVE ORDER.
- VII. INTRODUCTION.
- VIII. DECISIONS OF THE FIRST COMPTROLLER (WILLIAM LAWRENCE) IN THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES.
- IX. APPENDIX:
 - 1. ORGANIZATION AND DUTIES OF THE OFFICE OF THE TREASURER OF THE UNITED STATES.
 - 2. ORGANIZATION AND DUTIES OF THE OFFICE OF THE REGISTER OF THE TREASURY.
- X. INDEX TO DECISIONS.
- XI. INDEX TO APPENDIX.

"JOINT RESOLUTION requiring the Public Printer to publish certain decisions of the First Comptroller of the Treasury Department [22 Stat., 391].

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Public Printer be, and is, required to print not more than one volume each year of the decisions and opinions of the First Comptroller of the Treasury Department, with such explanatory matter as he may furnish, and to furnish for the use of each Senator, Representative, and Delegate in Congress ten copies thereof, to the Comptroller two thousand copies, and for distribution in the manner provided in section seven of the act of June twentieth, eighteen hundred and seventy-four (eighteenth Statutes at Large, page one hundred and thirteen), providing for the publication of the statutes, one-half the number therein mentioned.

"Approved, August 3, 1882."

CHAP. 333. AN ACT providing for publication of the Revised Statutes and the laws of the United States. [18 Stats., 113, 114.]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled.

SEC. 7. That after the close of each Congress the Secretary of State shall have edited, printed and bound a sufficient number of the volumes containing the Statutes at Large enacted by that Congress to enable him to distribute copies, or as many thereof as may be needed, as follows: To the President of the United States, four copies, one of which shall be for the library of the Executive Mansion, and one copy shall be for the use of the Commissioner of Public Buildings; to the Vice-President of the United States, one copy; to each Senator, Representative, and Delegate in Congress, one copy; to the librarian of the Senate, for the use of Senators, one hundred and fourteen copies; to the librarian of the House, for the use of Representatives and Delegates, four hundred and ten copies; to the Library of Congress, fourteen copies, including four copies for the law library; to the Department of State, including those for the use of legations and consulates, three hundred and eighty copies; to the Treasury Department, including those for the use of officers of customs, two hundred and sixty copies; to the War Department, including a copy for the Military Academy at West Point, fifty copies; to the Navy Department, including a copy for the library at the Naval Academy at Annapolis, a copy for the library of each navy-yard in the United States, a copy for the library of the Brooklyn Naval Lyceum, and a copy for the library of the Naval Institute at Charlestown, Massachusetts, sixty-five copies; to the Department of the Interior, including those for the use of the surveyors-general and registers and receivers of public land offices, two hundred and fifty copies; to the Post-Office Department, fifty copies; to the Department of Justice, including those for the use of the chief and associate justices, the judges and the officers of the United States and Territorial courts, four hundred and twenty-five copies; to the Department of Agriculture, five copies; to the Smithsonian Institution, two copies; to the Government Printing Office, one copy; and the Secretary of State shall supply deficiencies and offices newly created.

Approved, June 20, 1874.

TABLE OF CASES.

	Page.
Agency-Delegation.....	60
Appropriation-Extension	213
Atherton & Co.'s.....	315
Atherton & Co.'s (addition to).....	395
 Barnett's	 200
Board of Health	221
Board of Health (addition to)	396
 Claims-Assignment	 13
Claims-Assignment (addition to)	395
Clerks' Investigation.....	241
Colbath's	280
Commissioners' Per Diem.....	268
Comptroller's	283
Consular-Accounts	349
Contestant's Widow's	328
Crowley's.....	355
 De Bildt's.....	 170
Direct-Tax.....	331
District Contracts.....	198
Dorsey's	1
Durkee's.....	163
 Election Supervisors'.....	 153
Epidemic Disease	225
Evans's	111
Exigency	92
 False-Description	 265
 Garfield.....	 372
Garnet's	270
Gibson's	286
 Halstead's	 231
Huidekoper's (second)	155
 Informer's	 260
 Jordan's	 274
 Kennard's	 185

	Page.
Lake's	309
Lost Greenback	166
Malakof Bitters	129
Marshals' Mileage	88
Osage-Land	365
Otto's	298
Proceeds of Sales	36
Rheem's	305
Sanborn's	205
Seaman-Relief	138
Shelley's	321
Smith's	362
St. Elizabeth's Hospital	57
Substitute	345
Substituted Attorney's	313
Tayloe's	190
Territorial Court	148
Utah District Attorney's	119
Walsh's	122
Yorktown Centennial	141

TABLE OF CLAIMANTS.

	Page.
Acting Secretary of the Senate	280
Assignees of salaries and other claims against the United States	13, 395
Atherton, J. M., and Company	315, 395
 Barnett, W. H.	200
Bayley, S. P., United States Consul at Palermo, Sicily	138
Bowdish, Kate R.	265
 Chief-Justice of the Supreme Court of the Territory of New Mexico	148
Chief Supervisors of Elections	153
Clerk in the Treasury Department	345
Colbath, S. H.	280
Collins, B. H., Clerk in the Office of Commissioner of Internal Revenue	241
Commissioner of the General Land Office	365
Commissioners of Circuit Courts	268
Commissioners of the District of Columbia	198
Crowley, Richard	355
 Davis, C. H., late postmaster, sureties of	265
DeBildt, C. N.	170
Deputy First Comptroller	283
Disbursing Agent of the National Board of Health	221, 225, 396
Disbursing Clerk of Expenses of "German guests" at Yorktown Centennial ...	141
Disbursing Clerk of the Department of State	349
Disbursing Officers and Agents	60
Dorsey, John W.	1
Durkee, Joseph H.	163
 Evans, Samuel P.	111
 First Comptroller	28
 "Garfield" Claimants	372
Garnet, Henry H., deceased, legal representative of	270
Garnet, Sarah J. S.	270
Gibson, William J.	286
Governor of the State of South Carolina	331
 Halstead, Eminel P., Administrator of John J. and John N. Pulliam	231
Herbert, Hilary A., Attorney	328
Hobson, H. P., Administrator with the will annexed of John N. Pulliam	231
Hoen, A., and Company	92
Huidekoper, H. S.	155
 Informers	260

	Page.
Jordan, Edward L.....	274
Karst, L. G.....	166
Kennard, M. P., Assistant Treasurer of the United States at Boston.....	185
Lake, John L.....	309
Marshal of the District of Columbia.....	260
Marshal of the Eastern District of Tennessee.....	88
Officers and Employés claiming under an "appropriation-extension".....	213
Otto, William T., Supreme Court Reporter.....	296
Peterson, B. H.....	122
Public Printer.....	92
Rheem, C. B.....	305
Sanborn, John D.....	205
Secretary of the Interior.....	36
Shelley, Charles M.....	321
Smith, Henry H., Journal Clerk of the U. S. House of Representatives.....	362
Smith, James Q., deceased, widow of.....	328
Snyder, William Tayloe, Executor.....	190
State of South Carolina.....	331
Substitute.....	345
Substituted Attorneys.....	313
Superintendent of the Government Hospital for the Insane.....	57
Supervising Surgeon of Marine Hospital Service.....	36
Tayloe, Virginia.....	190
Taylor, Eugene.....	1
Utah District Attorney.....	119
Walsh, John A.....	122
Walz, Alphonse.....	129
White, G. H. B., Cashier.....	122
Widow of Contestant.....	328

TABLE OF CASES AND SUBJECTS IN THEIR RESPECTIVE ORDER.

	Page.
DORSEY'S:	
In the matter of withholding, for benefit of contractor, a penalty stipulated for in a subcontract for carrying mails.....	1
CLAIMS-ASSIGNMENT:	
In the matter of collecting, under powers of attorney to receive payment, salaries of officers, and other claims against the United States.....	13
PROCEEDS OF SALES:	
In the matter of sale of old material, condemned stores, &c., not needed for public service, and of the disposition to be made of the proceeds...	36
ST. ELIZABETH'S HOSPITAL:	
In the matter of the exchange or sale of property by the Superintendent of the Government Hospital for the Insane.....	57
AGENCY-DELEGATION:	
In the matter of the power of disbursing officers and agents to delegate authority to sign drafts and checks	60
MARSHALS' MILEAGE:	
In the matter of the mileage to which United States marshals are entitled, for serving process issued in criminal cases by commissioners of the circuit courts	88
EXIGENCY:	
In the matter of the authority to make a contract, without advertising, for printing lithographic plates for report of the Commissioner of Agriculture for the year 1880	92
EVANS'S:	
In the matter of compensation of a marshal of the United States holding over after the expiration of his term of office	111
UTAH DISTRICT ATTORNEY'S:	
In the matter of maximum of annual emoluments of district attorney of Utah Territory	119
WALSH'S:	
In the matter of the assignment of compensation to become due a contractor for carrying the mails	122
MALAKOF BITTERS:	
In the matter of refunding stamp tax on Malakof bitters.....	129
SEAMAN-RELIEF:	
In the matter of consular relief for destitute American seamen	138
YORKTOWN CENTENNIAL:	
In the matter of expenditures for the centennial anniversary of surrender of Lord Cornwallis.....	141
TERRITORIAL COURT:	
In the matter of the right of the legislative assembly of the Territory of New Mexico to prescribe terms for the Supreme Court thereof.....	148
ELECTION SUPERVISORS':	
In the matter of the mode of certifying accounts of chief supervisors of elections.....	153

XII**TABLE OF CASES AND SUBJECTS.**

	Page.
HUIDEKOPER'S (SECOND):	
In the matter of the legality of allowing commissions to a postmaster, on disbursements of money appropriated for construction of court-house and post-office building at place of location of a collector of customs ..	155
DURKEE'S:	
In the matter of compensations to marshals, who elect to receive "actual traveling expenses" in lieu of mileage for summoning jurors, under section 829 of the Revised Statutes.....	163
LOST GREENBACK:	
In the matter of replacing mutilated United States notes (greenbacks), under section 3580 of the Revised Statutes, in favor of finders thereof.	166
DE BINDT'S:	
In the matter of a husband's claim to have transferred to himself bonds of the United States, purchased, in part, with his wife's means, after marriage, and inscribed in her name with his assent	170
KENNARD'S:	
In the matter of the payment by public depositaries of pension checks having several indorsements	185
TAYLOR'S:	
In the matter of an executor's claim for a transfer to himself, as trustee, of United States bonds registered in the name of a deceased executor, his testator.....	190
DISTRICT CONTRACTS:	
In the matter of the authority of the Commissioners of the District of Columbia to make contracts for supplies prior to the passage of an appropriation act authorizing such contracts and providing for their payment	198
BARNETT'S:	
In the matter of the right of the holder of one-half of a matured United States coupon bond to payment thereof	200
SANBORN'S:	
In the matter of the right to set-off moneys legally due a claimant against a balance improperly certified in a settled account.....	205
APPROPRIATION-EXTENSION:	
In the matter of the extension of the legislative, executive, and judicial appropriations for the fiscal year 1882 to a portion of the fiscal year 1883	213
BOARD OF HEALTH:	
In the matter of the appropriation made by the act of August 7, 1882 (22 Stat., 315), for the National Board of Health	221
EPIDEMIC DISEASE:	
In the matter of the President's authority, in case of a threatened or actual epidemic, to direct who shall expend the \$100,000 appropriated by the sundry civil act of August 7, 1882 (22 Stat., 315), in aid of State and local boards of health, etc	225
HALSTEAD'S:	
In the matter of the authority of an administrator appointed in the District of Columbia on the estate of a deceased citizen of a State to collect Treasury drafts	231
CLERKS' INVESTIGATION:	
In the matter of appointment of clerks in the Treasury Department to investigate the offices of collectors of internal revenue.....	241
INFORMER'S:	
In the matter of the payment of informer's moieties under section 1174 of the Revised Statutes relating to the District of Columbia	260

TABLE OF CASES AND SUBJECTS.

XIII

	Page.
FALSE DESCRIPTION:	
In the matter of the payment of claims, when the statute appropriating money for the purpose contains a false description of the claims or the claimants	265
COMMISSIONERS' PER DIEM:	
In the matter of the per diem fee of circuit court commissioners in cases before them, when there is no "hearing and deciding on criminal charges," but only as to continuance	268
GARNET'S:	
In the matter of who is entitled to the salary due a public officer at the date of his decease, and to the residue of one year's salary allowed by Congress to the widow of such deceased officer	270
JORDAN'S:	
In the matter of repayment of internal-revenue income tax to citizens of Tennessee	274
COLBATH'S:	
In the matter of conflicting descriptions in an appropriation act of the amount of salary due a public employé	280
COMPTROLLER'S:	
In the matter of the appointment by the President of an officer "to perform the duties of the office of the First Comptroller in" the Treasury Department, "during the absence * * * of the said First Comptroller and the Deputy First Comptroller in the said Department"	283
GIBSON'S:	
In the matter of the payment of lost registered bonds of the United States, with indorsements in blank made thereon by the payee, but with no certificates of the acknowledgment of the execution thereof	286
OTTO'S:	
In the matter of the character and mode of disbursement of the appropriation made by the act of August 5, 1882, for the office of Supreme Court Reporter	296
RHEEM'S:	
In the matter of the right of the same person to receive the compensations prescribed by law for the two positions (1) secretary to the school trustees, and (2) clerk to a superintendent of public schools in the District of Columbia	305
LAKE'S:	
In the matter of the compensation for publishing proposals for carrying mails	309
SUBSTITUTED ATTORNEY'S:	
In the matter of the rights of an attorney presenting a claim after the suspension or disbarment of a prior attorney presenting the same claim ..	313
ATHERTON & CO.'S:	
In the matter of refunding to distillers a "deficiency tax" under a private relief act	315
SHELLEY'S:	
In the matter of the right of a Representative in Congress elected to fill a vacancy, to compensation prior to his election	321
CONTESTANT'S WIDOW'S:	
In the matter of the right of the widow of a contestant for a seat in the House of Representatives, declared elected after his death, to be paid the salary of the place contested	328
DIRECT-TAX:	
In the matter of the effect of the twelfth section of the direct-tax act of June 7, 1862, 12 Statutes, 425	331

	Page.
SUBSTITUTE:	
In the matter of the appointment of a substitute to perform the duties of clerk in the Treasury Department, with a right to receive part of the clerk's salary	345
CONSULAR-ACCOUNTS:	
In the matter of the settlement of the accounts of diplomatic and consular officers.....	349
CROWLEY'S:	
In the matter of the right of a Representative in Congress to compensation for services rendered the United States, during his term as Representative, but not pertaining to his duties as such	355
SMITH'S:	
In the matter of compensation for preparing a digest of the rules of the House of Representatives	362
OSAGE-LAND:	
In the matter of the payment of expenses incident to the disposition of Osage trust and diminished-reserve lands and Osage ceded lands in Kansas	365
GARFIELD:	
In the matter of the payment of claims and allowances "growing out of the illness and burial of the late President James A. Garfield."	372
CLAIMS-ASSIGNMENT:	
<i>Ante</i> 13-36. Addition to.....	395
ATHERTON & Co.'s:	
<i>Ante</i> 315-320. Addition to	395
BOARD OF HEALTH:	
<i>Ante</i> 221-225. Addition to	396
APPENDIX	399
Organization and duties of the office of the Treasurer of the United States..	401
Organization and duties of the office of the Register of the Treasury	409

INTRODUCTION.

Prior to the year 1880 but few of the decisions of the First Comptroller in the Department of the Treasury were printed. The *practice* of the Treasury Department in matters connected with the office of the First Comptroller rested mainly on, and was in large measure controlled by, the knowledge of officers connected with the Department. Much of this knowledge was derived from usages, the evidence of which could only be found in the manuscript files, records, and correspondence of the Department, and to these there were, and are, no ready facilities for reference. Many *questions of law* arising in this office had been made the subjects of decisions based upon usages derived from the same sources, which were necessarily inconvenient of access, and practically beyond the reach of claimants and others outside of the Department. In view of this, it was almost impossible to avoid incongruous action in matters of *practice*, and contradictory decisions on similar *questions of law*; and those seeking and entitled to information found it difficult to obtain it. To obviate these difficulties in some measure, it was deemed advisable, in the year 1880, "to commence the publication of such of the decisions of the First Comptroller" as were "supposed to be of a general character, and sufficiently important to justify this course."

A limited number of copies of the first volume of these Decisions for the year 1880 was published by the Public Printer on requisitions made by the Treasury Department. This volume was transmitted by the Secretary of the Treasury to the Speaker of the House of Representatives, and, under the authority of an order of that body, a second, and revised, edition of it was printed. A similar course, with a similar result, was pursued as to the second volume of the Decisions for the year 1881. The Joint Resolution of Congress, approved August 3, 1882 (22 Stat., 391), requires the Public Printer "to print not more than one volume each year of the decisions and opinions of the First Comptroller of the Treasury Department, with such explanatory matter as he may furnish." The following volume is printed under this authority.

The distinguished and able lawyers who have occupied the high office of Attorney-General, have, in the volumes of Opinions, furnished much valuable information on subjects connected with the Departments. The learned and enlightened labors of the Court of Claims, in the volumes of decisions of that Court, have also furnished a fund of useful instruction. The same may be said to a limited extent of the decisions of other able courts. But the courts can rarely reach matters of *practice* in the Departments, and but to a limited extent can they determine

questions of law arising therein. This will appear from the statutes giving the courts jurisdiction, from those giving jurisdiction to executive officers, and from the questions decided in the Departments. It is well understood, also, that courts cannot generally interfere with questions the decision of which is given by law exclusively to executive officers. Thus it has been said, "that whatever power or duty is expressly given to or imposed upon the executive department, is *altogether* free from the interference of the other branches of the Government." (Attorney-General *v.* Brown, 1 Wis., 522; Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 15). It would be impracticable for the Attorney-General to examine, give opinions upon, or decide, all, or any considerable portion, of the questions arising in the Treasury Department, and no law has required or permitted this. (Rev. Stat., 356; 9 Op. Att. Gen., 36.)

The Revised Statutes, sec. 356, provide, that "the head of any Executive Department may require the *opinion* of the Attorney-General on any questions of law arising in the administration of his Department." This is to be construed with reference to other sections, giving jurisdiction to accounting officers, and declaring the effect of the decisions of the Comptrollers. (Rev. Stat., 191, 269, 277.) From all these it is clear, that the Attorney-General, as a general rule, is not charged with any duty in connection with those questions on which accounting officers are required to make *decisions*. The head of a Department, even when advised by the Attorney-General, must act on his own judgment. Thus, Attorney-General Black, in an opinion given to the head of a Department, June 4, 1857 (9 Op. Att. Gen., 36), said:

The duty of the Attorney-General is to advise, not to decide. A thing is not to be considered as done by the head of a Department merely because the Attorney-General has advised him to do it. You may disregard his opinion if you are sure it is wrong. He aids you in forming a judgment on questions of law; but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes, in order to see the better with your own.

The recognized usage, and the settled law, is, that every accounting officer must act on his own judgment. (Bender's case, 1 Lawrence, Compt. Dec., 2d ed., 352, *note*; 1 Lawrence, Compt. Dec., 2d ed., App., ch. xii, 533.)

Thus, the Attorney-General, in an opinion October 23, 1863 (11 Op. Att. Gen., 5), said:

By long and unbroken construction and practice, it has been settled that the Attorney-General acts, in performing this legal duty, simply as the law adviser of the President and heads of Departments. He is bound, upon points of law and facts stated by them, to give legal opinions in aid of *their judgment*, in matters for *their decision*. * * * He is not the official legal adviser of any subordinate officer of any Department, except the Solicitor of the Treasury. It is true that he often gives to heads of Departments advice and opinions upon questions arising in the bureaux of their respective Departments, but such advice and opinions are intended to aid only the *judgment of the Secretary himself* in deciding such questions. To enlarge the rule beyond this extent, would not only be *unwarranted by law*, but would convert the

Attorney-General's office into a sort of general appellate court, where dissatisfied claimants might seek relief from adverse decisions, and subordinate executive officers find a way of escape from official labor and responsibility.

And the Attorney-General, when asked for an opinion to aid an auditor, said:

[It] would be *clearly wrong* now to give an opinion in a case which not only is not before the Secretary of the Treasury, but which evidently cannot reach him. My opinion would simply be advice to the Auditor and not to the Secretary, and this I *have no power by law to give*. (11 Op. Att. Gen., 6.)

The accounting officers have, in many matters, a jurisdiction which they alone can exercise, and which no decision or opinion has ever claimed an authority to control. The jurisdiction of these officers extends to "all claims and demands whatever [1] by the United States or [2] against them [it]," the settlement of which is authorized by law. (Rev. Stat., 236.) As to each class such officers may (1) allow and certify as due, or (2) reject. As to claims against the United States certified for payment for the amount demanded by the claimants, *which comprehend very nearly all on which payments from the Treasury are made*, the decision of the proper Comptroller is not "subject to be changed or modified" by any executive or judicial authority, but gives a right to payment, if the proper appropriation exists, subject only to the control of Congress up to the time of payment. (Rev. Stat., 191.) It seems but reasonable and just, that, in the exercise of this wide jurisdiction, involving questions of *practice* and the *decision* of questions of *law* and *fact*, in which individual rights are determined, and general principles settled, affecting vast public and private interests to an extent not readily measured by comparison with the jurisdiction of courts in money values, *reasons* for the more general and important decisions of the character stated should be given in printed form. There must be some final and authoritative source for the decision of all questions; and it is not assuming too much to say, that a jurisdiction exercised by the Comptroller for nearly a century has met with general approval. To this result the valuable and learned labors of the Auditors have contributed the full measure of all that could have been expected or desired.

As to the duties and powers of Auditors, it is said by Richardson, Judge, in *Ridgway's Case* (18 Ct. Cls.), that—

It is no part of the duty of Auditors (except the Sixth Auditor) to make decisions binding in any way upon anybody; and their opinions and decisions upon controverted questions, if they choose to give them, have no official determining force. They are only to examine accounts, certify balances, and transmit them to the proper Comptroller for his decision thereon. (Rev. Stat., secs. 276-300.)

The necessity for formal printed decisions by the First Comptroller will be manifest by reference to the subject-matters and extent of his jurisdiction. These have been referred to in the Introduction to the first volume of the Decisions, and it is impracticable now to state fully what this jurisdiction is, its extent, and importance, and to enumerate even

the classes of questions which arise, much less to go into detail; but among these questions may be included:

I.—Questions involving controverted titles to Government bonds, and others affecting the liability of the United States, arising, as such questions do, under the laws of Congress, of the several States and Territories, and of foreign nations. (Putnam's Case, 1 Lawrence, Compt. Dec., 2d ed., 208; Sallu's Case, *Id.*, 214; Klink's Case, *Id.*, 242; Trustee-Survivorship Case, 2 Lawrence, Compt. Dec., 2d ed., 232; Bond-Assignment Case, *Id.*, 248; Kansas Case, *Id.*, 201; Moodie's Case, *Id.*, 374; Lost-Greenback Case, 3 Lawrence, Compt. Dec., 166; De Bildt's Case, *Id.*, 170; Tayloe's Case, *Id.*, 190; Barnett's Case, *Id.*, 200; Gibson's Case, *Id.*, 286.)

II.—Questions relating to the construction of acts prescribing salaries, fees, and compensations of officers, agents, and employés of the Government. (Herndon's Case, 1 Lawrence, Compt. Dec., 2d ed., 45; Viser's Case, *Id.*, 75; Hunter's Case, *Id.*, 151; Ashton's Case, *Id.*, 162; Wade's Case, *Id.*, 302; Clerk's Case, *Id.*, 305; Reporter's Case, *Id.*, 307; Bender's Case, *Id.*, 317; Richardson's Case, *Id.*, 357; Evans's Case, 2 Lawrence, Compt. Dec., 2d ed., 1; Randolph's Case, *Id.*, 12; Langford's Case, *Id.*, 271; Subpœna Case, *Id.*, 286; Wallace's Case, *Id.*, 376; Leake's Case, *Id.*, 431; Printers' Case, *Id.*, 504; Riley's Case, *Id.*, 531; Chesney's Case, *Id.*, 538; Brown's Case, *Id.*, 540; Reward Case, *Id.*, 545; Utah Case, *Id.*, 559; Leave-of-Absence Case, *Id.*, 566; Kilbourn's Case, *Id.*, 573; Marshals' Mileage Case, 3 Lawrence, Compt. Dec., 88; Evans's Case, *Id.*, 111; Utah District-Attorney's Case, *Id.*, 119; Election Supervisors' Case, *Id.*, 153; Durkee's Case, *Id.*, 163; Sanborn's Case, *Id.*, 205; Appropriation-Extension Case, *Id.*, 213; Commissioners' Per Diem Case, *Id.*, 268; Garnet's Case, *Id.*, 270; Colbath's Case, *Id.*, 280; Shelley's Case, *Id.*, 321; Contestant's Widow's Case, *Id.*, 328; Crowley's Case, *Id.*, 355; Smith's Case, 362.)

III.—Questions as to the authority of the President, heads of Departments, and others, in the execution of laws, to appoint agents. (Birch's Case, 1 Lawrence, Compt. Dec., 2d ed., 154; Inspector's Case, *Id.*, 201; Bender's Case, *Id.*, 317; Eveleth's Case, 2 Lawrence, Compt. Dec., 2d ed., 20; Swamp-Land Case, *Id.*, 136; Huidekoper's Case, *Id.*, 354; Senate-Disbursement Case, *Id.*, 404; Agency-Delegation Case, 3 Lawrence, Compt. Dec., 60; Huidekoper's Case (second), *Id.*, 155; Epidemic Disease Case, *Id.*, 225; Clerk's Investigation Case, *Id.*, 241; Comptroller's Case, *Id.*, 283; Substitute Case, *Id.*, 345.)

IV.—Questions as to what expenditures are authorized by the appropriation acts, under which the vast disbursements from the Treasury are made. (Wood's Case, 1 Lawrence, Compt. Dec., 2d ed., 1; Tillamook Case, *Id.*, 138; Arsenal Case, *Id.*, 147; Lunch Case, 2 Lawrence, Compt. Dec., 2d ed., 33; Decoration Case, *Id.*, 69; Survey Case, *Id.*, 234; Guiteau's Case, *Id.*, 484; Exigency Case, 3 Lawrence, Compt. Dec., 92; Seaman-Relief Case, *Id.*, 138; Yorktown Centennial Case,

Id., 141; Territorial Court Case, *Id.*, 148; Appropriation-Extension Case, *Id.*, 213; Board of Health Case, *Id.*, 221; Informer's Case, *Id.*, 260; False-Description Case, *Id.*, 265.)

V.—Questions as to whether acts make appropriations, or only give authority to officers in pursuance of appropriations elsewhere made. (Canal Case, 1 Lawrence, Compt. Dec., 2d ed., 141; Bundy's Case, *Id.*, 184; Bender's Case, *Id.*, 352, *note*; Indian-Land Case, 2 Lawrence, Compt. Dec., 2d ed., 369; District Land-Office Case, *Id.*, 415; School-Fund Case, *Id.*, 581; Proceeds of Sales Case, 3 Lawrence, Compt. Dec., 36; St. Elizabeth's Hospital Case, *Id.*, 57; Direct-Tax Case, *Id.*, 331; Osage-Land Case, *Id.*, 365.)

VI.—Questions as to the various kinds of appropriations, whether annual, permanent annual or permanent specific, and as to each, whether limited or indefinite in amount; and others of a different character. (Ashton's Case, 1 Lawrence, Compt. Dec., 2d ed., 162; Conger's Case, 2 Lawrence, Compt. Dec., 2d ed., 35; Osage-Indian Case, *Id.*, 245; Edmund's Case, *Id.*, 528; Appropriation-Extension Case, 3 Lawrence, Compt. Dec., 213; Otto's Case, *Id.*, 296.)

VII.—Questions as to the ownership of drafts, the sufficiency of indorsements thereon, and the right of courts to appropriate them to creditors of their holders. (Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 11; Rhawn's Case, *Id.*, 109; Moyer's Case, *Id.*, 116; Infant's Case, 2 Lawrence, Compt. Dec., 2d ed., 27; DiCesnola's Case, *Id.*, 142; Clift's Case, *Id.*, 187; Moodie's Case, *Id.*, 374; Contract-Assignment Case, *Id.*, 472; Kennard's Case, 3 Lawrence, Compt. Dec., 185; Halstead's Case, *Id.*, 231.)

VIII.—Questions as to the liability of the Government to refund taxes. (Flack's Case, 1 Lawrence, Compt. Dec., 2d ed., 186; Savings-Bank Case, *Id.*, 194; Leggett's Case, 2 Lawrence, Compt. Dec., 2d ed., 349; Worrall's Case, *Id.*, 490; Malakof Bitters Case, 3 Lawrence, Compt. Dec., 129; Jordan's Case, *Id.*, 274; Atherton & Co.'s Case, *Id.*, 315.)

IX.—Questions as to the liability of the Government to refund moneys to purchasers of public lands erroneously sold. (Rev. Stat., 2362, 2363; act June 16, 1880, 21 Stat., 287; Allspach's Case, 2 Lawrence, Compt. Dec., 2d ed., 260.)

X.—Questions as to the liability of officers to the Government, and the enforcement of prompt payment thereof. (Rev. Stat., 269.)

XI.—Questions arising on appeals from the Sixth Auditor. (Rev. Stat., 270, 277; Penn Yan Case, 2 Lawrence, Compt. Dec., 2d ed., 40; Martin's Case, *Id.*, 327; Star-Route Case, *Id.*, 446; Dorsey's Appeal, 3 Lawrence, Compt. Dec., 1; Walsh's Case, *Id.*, 122; Lake's Case, *Id.*, 309; Reeside's Appeal, 4 Lawrence, Compt. Dec.)

XII.—Questions as to the disbursement of moneys by the Commissioners of the District of Columbia under various laws. (Audit Case, 1 Lawrence, Compt. Dec., 2d ed., 37; Police Case, *Id.*, 57; Richey's

Case, *Id.*, 85; Drawback Case, *Id.*, 158; Safford & Co.'s Case, *Id.*, 262; Clerk's Case, *Id.*, 305; Police-Station Case, 2 Lawrence, Compt. Dec., 2d ed., 338; Fish's Case, *Id.*, 536; District Contracts Case, 3 Lawrence, Compt. Dec., 198; Informer's Case, *Id.*, 260; Rheem's Case, *Id.*, 305.)

XIII.—Questions as to the validity of Treasury warrants for the payment of money, and as to the authority of the First Comptroller in relation to countersigning them. (Rev. Stat., 269; Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 17; Bender's Case, *Id.*, 333; Bender's Case (second), *Id.*, 395; 1 Lawrence, Compt. Dec., 2d ed., App., Ch. XII, 549; Clift's Case, 2 Lawrence, Compt. Dec., 2d ed., 196; Artificial Limbs Case, *Id.*, 382; Benton's Case, *Id.*, 455; Contract-Assignment Case, *Id.*, 482; Keyser's Case, 4 Lawrence, Compt. Dec.)

XIV.—Questions as to assignments of salaries, compensations, and claims against the Government by officers, employés, and claimants thereof. (Dana's Case, 2 Lawrence, Compt. Dec., 2d ed., 203; Benton's Case, *Id.*, 455; Claims-Assignment, 3 Lawrence, Compt. Dec., 13.)

XV.—Questions relating to Treasury Department practice, in the various forms in which they arise in relation to claims.

These are given only by way of example, and by no means as an enumeration *in extenso*. The detailed statements of the work performed in the several divisions of the First Comptroller's office, and in other Bureaux of the Treasury Department, found in the appendixes to the several volumes of the Decisions of the First Comptroller, present other subjects of jurisdiction.

In matters reported by the First and Fifth Auditors, and demands settled by the Commissioner of the General Land Office, the First Comptroller may review the evidence, and increase, or reduce, or refuse to allow, amounts stated as due to claimants by those officers. (Rev. Stat., 269.) On appeals from the Sixth Auditor, he exercises a similar jurisdiction. (Rev. Stat., 270, 277.)

As the First Comptroller is required to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law, for the payment of money from the Treasury for every department and branch of the Government, he has, on questions of law apparent on the papers on which such warrants are issued, a supervisory jurisdiction reaching almost every question of law that can arise as to the validity of claims against the Government. (Bender's Case, 1 Lawrence, Compt. Dec., 2d ed., 317; *Id.*, 391.)

The construction of appropriation acts is one of the important parts of this jurisdiction. (Canal Case, 1 Lawrence, Compt. Dec., 2d ed., 141; Arsenal Case, *Id.*, 147; Bundy's Case, *Id.*, 184; Conger's Case, 2 Lawrence, Compt. Dec., 35.) And questions as to the authority for making advances of money to disbursing officers is almost of equal importance. (Birch's Case, 1 Lawrence, Compt. Dec., 2d ed., 154; Bender's Case, *Id.*, 352; *note*; Huidekoper's Case, 2 Lawrence, Compt. Dec., 354.)

The wide jurisdiction exercised by the First Comptroller in counter-

signing warrants, involving the decision of many important and difficult questions of law (Rev. Stat., 269; 1 Lawrence, Compt. Dec., 2d ed., App., Ch. XII, 549; *Id.*, Ch. I, 411, 431), is alluded to by Alexander Hamilton, who, in discussing the authority and responsibility of officers in issuing warrants, says:

As between the officers of the Treasury, I take the responsibility to stand thus: The Secretary and Comptroller, in granting warrants upon the Treasury, *are both answerable for their legality*. In this respect *the Comptroller is a check upon the Secretary*. With regard to the expediency of an advance, in my opinion, the right of judging is exclusively with the head of the Department. The Comptroller has no voice in this matter. So far, therefore, as concerns legality in the issues of money while I was in the Department, *the Comptroller must answer with me*; so far as a question of expediency or the due exercise of discretion may be involved, I am solely answerable; and uniformly was the matter understood between successive Comptrollers and myself. Also, it is essential to the due administration of the Department that it should be so understood. (Works of Hamilton, vol. vii, 548.)

And he refers to the "*Comptroller whose office imports the second trust in the Department.*"

The First Comptroller is the only officer who countersigns warrants. (Rev. Stat., 269.) No money can be paid into, or out of, the Treasury without the authority of his countersignature. And there are various other questions over which accounting officers must exercise a jurisdiction. (Bender's Case, 1 Lawrence, Compt. Dec., 2d ed., 352, *note*.)

The jurisdiction of the First Comptroller on appeals from settlements made by the Auditor of the Treasury for the Post Office Department (Sixth Auditor) may require decisions affecting the whole postal service and the compensations of postmasters, and contractors for carrying the mails. (Rev. Stat., 270, 277; Martin's Case, 2 Lawrence, Compt. Dec. 2d ed., 327; Star-Route Case, *Id.*, 446; Dorsey's Appeal, 3 Lawrence, Compt. Dec., 1; Walsh's Case, *Id.*, 122; Lake's Case, *Id.*, 309; Andrew's Appeal, 4 Lawrence, Compt. Dec.; Reeside's Appeal, *Id.*; Railway Compensation Case, *Id.*)

In view of this right of appeal, a usage has properly grown up by which this Auditor frequently asks the opinion of the Comptroller in advance, when all parties in interest may be heard. Thus, under the Act of March 3, 1883 (22 Stat., 453), making appropriations for the postal service for the fiscal year ending June 30, 1884, and the act of same date (22 Stat., 602, sec. 2), "to adjust the salaries of postmasters," the Auditor asked the opinion of the First Comptroller as to when the provisions in section 2 of the latter act, as to "compensation of postmasters of the fourth class," took effect. It was held that they took effect at the date of the act; and thus a change was prospectively made for the compensation of about forty-five thousand postmasters.

As to a majority of the various questions entrusted to the judgment and determination of accounting officers, courts, as a general rule, can exercise no control. This subject will hereinafter be alluded to in considering "the relation of the accounting officer to judicial authority."

Information in some permanent form on all these subjects is a public

necessity. And other reasons seem to justify the publication of the Decisions of the First Comptroller. Among them may be mentioned these: (1) There is no general system of *judicial national* common law by which uniform principles are settled, even if executive officers could always adopt them; (2) there is a well-defined complete system of *executive national* common law; and (3) the local common law which is administered in the national courts is not always adapted to executive administration or to rights settled thereby. Some discussion of these propositions may be proper.

I. It can scarcely be said that there is or can be, under existing legislation, any general system of *judicial national* common law. The act of September 24, 1789 (1 Stat., 92, sec. 34), carried into the Revised Statutes as sec. 721, provides that: "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

This has given rise to many questions.*

An eminent law writer says:

It has been declared by the Supreme Court of the United States, to be clear that there can be no common law of the Union. * * * [Each State] * * * may have its local usages and common law; but there is no principle which pervades the Union and has the authority of law, that is not embodied in the Constitution or laws [treaties and acts of Congress] of the Union. The common law could be made a part of the federal system only by legislative adoption. It is settled that the federal courts have no jurisdiction of common-law offences, and that there is no common law of the Union.†

This is substantially correct as to the *Judiciary* of the United States.

II. But, in those matters not subject to judicial jurisdiction, there is a complete system of *executive national* common law, of universal application within the territorial limits of the United States, and having, to

* *Brown v. Van Braam*, 3 Dall., 344; *Robinson v. Campbell*, 3 Wh., 212; *Cohens v. Virginia*, 6 Wh., 264; *Wayman v. Southard*, 10 Wh., 1; *Green v. Neal's Lessee*, 6 Pet., 291; *Ross v. Duvall*, 13 Pet., 45; *Swift v. Tyson*, 16 Pet., 1; *Lane v. Vick*, 3 How., 464; *Luthur v. Borden*, 7 How., 1; *Williamson v. Berry*, 8 How., 495; *Van Rensselaer v. Kearney*, 11 How., 297; *United States v. Reid*, 12 How., 361; *Neves v. Scott*, 13 How., 268; *Carroll v. Carroll's Lessee*, 16 How., 275; *Morgan v. Curtaneous*, 20 How., 1; *Fenn v. Holme*, 21 How., 481; *Jeter v. Hewitt*, 22 How., 352; *Snydam v. Williamson*, 24 How., 327; *Sheirburn v. Cordova*, 24 How., 423; *Hausnecht v. Claypool*, 1 Bl., 431; *Jefferson Branch Bank v. Skelly*, 1 Bl., 436; *Conway v. Taylor's Executor*, 1 Bl., 603; *Chicago v. Robbins*, 2 Bl., 418; *Leffingwell v. Warren*, 2 Bl., 599; *Bridge Proprietors v. Hoboken Com.*, 1 Wall., 145; *Gelpcke v. Dubuque*, 1 Wall., 175; *Christie v. Pridgeon*, 4 Wall., 203; *Mitchell v. Burlington*, 4 Wall., 274; *Ewing v. City of St. Louis*, 5 Wall., 419; *Nichols v. Levi*, 5 Wall., 433; *Delmas v. Insurance Com.*, 14 Wall., 667, 8; *Boyce v. Tabb*, 18 Wall., 546; See Act June 1, 1874, 18 Stat., 50.

† *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 13; citing *State of Pennsylvania v. The Wheeling &c. Bridge Co., et al.* 13 How., 519; *Wheaton and Donaldson v. Peters and Grigg*, 8 Pet., 591, 659. In *Lynch v. Clarke* (1 Sandf., ch. 583, 654), it is said that, "to a limited extent, the common law (* * *), prevails in the United States as a system of national jurisprudence."

a large extent, an extra-territorial operation. This system of common law extends to a vast number of objects, and to immense values, and affects every person, natural or artificial, subject to its operation, including all within the Union, and all elsewhere having claims against the Government or rights to be enforced by executive authority.

1. The President has many powers subject to no other judicial or legislative control than as the power of impeachment may be so regarded.* In exercising these powers, usages grow up, construction is given to the Constitution, treaties, and statutes, and a system of unwritten law is established, as wide in scope and effect as the objects to which it extends and the persons to whom it applies.

2. The administration of each of the great Executive Departments requires those officers therein clothed with the authority of finally deciding the many questions intrusted to their jurisdiction, to give construction to the same great sources of law—the Constitution (Seward's Case, 2 Lawrence, Compt. Dec., 2d ed., 53; Ochiltree's Case, 4 *Id.*), treaties (Ute Case, 1 Lawrence, Compt. Dec., 2d ed., 383; Kansas Case, 2 *Id.*, 301; Indian-Land Case, 2 *Id.*, 369), and acts of Congress. Questions of international law also arise for decision. (Seward's Case, 2 Lawrence, Compt. Dec., 2d ed., 53.) Here also, usages have prevailed and are growing up; national and international common-law principles have been, and are being, announced and settled; construction has been, and is being, given to all the written laws, and an entire system of executive national common law is in full operation. This grows out of executive administration, and its perfect independence of the other co-ordinate departments of the Government, as created by the Constitution. It exists as a necessity. It is universal, and for its purposes, and within its jurisdiction, all-pervading. The executive construction of the Constitution, treaties, and statutes, like the judicial, is as much a part of these great sources of law as if incorporated therein in written words. It is a comprehensive system, as complex, and with as far-reaching consequences, as any system of law in any age or country. The development and elucidation of this system, as an entirety and in the details of its various branches, is a work for many and elaborate commentaries, requiring profound study and thought.†

* See Whiting's War Powers of the President, *passim*. Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 14; President Jackson's Veto Message, July 10, 1832, 2 Statesman's Manual, 772; State of Mississippi v. Johnson, 4 Wall., 500; Bates, Attorney-General, on *Habeas Corpus*, July 5, 1861, 10 Op. Att. Gen., 74; Story, Const., §§ 1566, 1902, note 2; 4 Jefferson's Correspondence, 149, 151; Paschal, Annotated Const., 3d ed., 257, note 252; *Id.* 184, note 189; *Id.* 163, note 165; Marbury v. Madison, 1 Cranch, 137; Kendall v. The United States, 12 Pet., 524; The State v. The Southern Pacific R. R. Co., 24 Texas, 117; The State v. Delesdenier, 7 *Id.*, 95; 4 Op. Att. Gen., 248; 6 *Id.*, 220, 500; 9 *Id.*, 524; Prize Cases, 2 Black, 666.

† Lawrence, Compt. Dec., 2d ed., Introduction; Agency-Delegation case, 3 Lawrence, Compt. Dec., 76, *et seq.* It is said in the United States v. Macdaniel (7 Peters, 14), that, "A practical knowledge of the action of any one of the great Departments of

3. In thus assigning to the executive department of the Government a system of common law, it is only giving to it the position occupied by the legislative department. There is also a common law for the latter great department. The *Lex Parliamentaria* is a system of common law of wide extent, developed through ages, and discussed in many volumes.*

III. The executive national common law is frequently different from that system of common law which prevails in the courts, even on similar questions, and the difference rests on conditions and circumstances which fully justify it.†

In some cases, principles of law applicable in controversies between private persons are not applicable when the Government is concerned.

Very many questions of law, and very many principles in the construction of statutes, which never do, nor can, reach the courts, are determined by accounting officers.‡

the Government must convince every person that a head of a Department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate, by law, the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the Government. Hence, of necessity, *usages have been established in every department of the Government which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.* And no change of such usages can have a retrospective effect, but must be limited to the future. Usage cannot alter the law, but it is evidence of the construction given to it; and must be considered binding on past transactions." See *Converse v. United States*, 21 How., 463. Usage has much force. (*Edwards, Lessee, v. Darby*, 12 Wheat., 210; *United States v. Alexander*, 12 Wall., 177; *United States v. Pugh*, 99 U. S., 267; *Gratiot v. United States*, 15 Pet., 336.)

*Jefferson's Manual of Parliamentary Practice; Paschal, Annotated Const., 3d. ed., 86, note 47; Cushing's Manual; May's Parliamentary Law; Hastel's Precedents; and there are works on Parliamentary Law by Burleigh, Warrington, and Wilson.

†Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 11; Bender's Case, *Id.*, 343; Infant's Case, 2 *Id.*, 31; Exigency Case, 3 *Id.*, 92, 105, 108; De Bildt's Case, 3 *Id.*, 179, 181; Halstead's Case, 3 *Id.*, 231; s. c., 10 Washington Law Reporter, August 30, 1882, 550; Keyser's Case, 4 Lawrence, Compt. Dec. And compare *Bonnafon and Norton's Case*, 14 Ct. Cl., 491, with *Avery v. United States*, 12 Wall., 304.

The law of *res adjudicata*, as applied to the decisions of a Comptroller, rests on a principle well settled (*Ex parte Randolph*, 2 Brock., 473, citing *Crepps v. Durden*, 2 Cowper, 640; *Mills v. Collett*, 6 Bing., 85; s. c., 19 Eng. Com. Law Rep., 11), but, as applied to judicial judgments, rests on an entirely different principle. (*Broom, Legal Max.*, 328, 333.) From this difference is deduced the rule that the decision of a Comptroller only determines matters actually passed upon, while a judgment in the courts operates as a *res adjudicata* on all matters which, under the pleadings, could have been acted on. (*Reeside's Appeal*, 4 Lawrence, Compt. Dec.)

‡2 Lawrence, Compt. Dec., 2d ed., Introduction.

There are many cases in which the quasi judicial authority of the First Comptroller is independent of the courts. (*Draft Case*, 1 Lawrence, Compt. Dec., 2d ed., 11;

It follows, of necessity, that executive officers do not always adopt the principles of judicial decisions. And they equally, of necessity, must sometimes pass on the jurisdiction and authority of the courts, and even in some instances disregard their judgments and decisions.*

The elementary law books are barren upon these classes of questions, because decisions upon them have not been published. This is especially so with works on the construction of statutes, in which it is rare to find a reference to those rules of interpretation and construction which peculiarly relate to questions in which the Government is concerned.

On those questions over which executive officers and courts have concurrent or successive jurisdiction, the prevailing usages and decisions are mutually regarded as of persuasive weight. Even in those matters over which courts have exclusive jurisdiction the construction given to statutes by executive officers is generally adopted.†

There is no more difficult duty imposed on judicial and executive officers than that of giving construction to statutes, and it is one which occupies a large portion of their time. Sir A. Cockburn, in his speech at the Guildhall on receiving the freedom of the city of London, March 9, 1876, said: "The greater part of our time in the Court of Queen's Bench, at least two days a week, is taken up in interpreting acts of Parliament, and I confess I never have to deal with one of them but I feel a sort of convulsive shudder come over me." (Hardcastle, Statutory

Viser's Case, *Id.*, 75; Safford & Co.'s Case, *Id.*, 262; Agency Delegation Case, 3 *Id.*, 78.)

Executive decisions are frequently so conclusive that the courts are bound by them. Thus, the decision of supervisors, in declaring and entering upon their records the result of the canvass of a vote on the removal of a county seat, rendered under an empowering statute, is so conclusive that the courts cannot afterwards act upon it. (Attorney-General v. Supervisors of Lake Co., 33 Mich., 290; Attorney-General v. Supervisors of Benzie Co., 34 *Id.*, 211; Wells, Res Adjudicata and Stare Decisis, sec. 603.) This rests on the principle that when a statute intrusts to specified officers the decision of a question of fact, their determination thereon is generally final and conclusive. (Exigency Case, 3 Lawrence, Compt. Dec., 97; Seaman-Relief case, *Id.*, 138; Yorktown Centennial Case, *Id.*, 141; Keyser's Case, 4 *Id.*; *Ex parte* Randolph, 2 Brock., 473; 10 Op. Att. Gen., 259; Reeside's Appeal, 4 Lawrence, Compt. Dec.; Ballance v. Forsyth *et al.*, 24 How., 185.) Thus, in Johnson v. Towsley (13 Wall., 72), one point in the syllabus is, "that when a special tribunal is authorized to hear and determine certain matters arising in the course of its duties, its decisions within the scope of its authority are conclusive." (Attorney-General v. Brown, 1 Wis., 522; Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 13.) So, the allowance of claims by executive officers under certain statutes gives a *prima facie* right of action in the Court of Claims. (United States v. Kaufman, 96 U. S., 567; United States v. Savings Bank, 104 U. S., 728.)

* Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 11; Viser's Case, *Id.*, 75; Bender's Case, *Id.*, 343; Seat's Case, 2 *Id.*, 111; s. c. 18 Ct. Cl.; Halstead's Case, 3 Lawrence, Compt. Dec., 231; Keyser's Case, 4 *Id.*

† United States v. Moore, 95 U. S., 763; Edwards's Lessee v. Darby, 12 Wheat., 210; United States v. The State Bank of North Carolina, 6 Pet., 29; United States v. MacDaniel, 7 Pet., 1; Smythe v. Fiske, 23 Wall., 374; United States v. Pugh, 99 U. S., 265; United States v. Bowen, 100 U. S., 511; Swift Co. v. United States, 105 U. S., 695.

Law, 5, *note* 7.) The construction of statutes requires even more time and thought by judges and executive officers in the United States than in Great Britain, because of the great multiplication of statutes enacted by Congress and by the numerous State and Territorial legislatures. And, in the United States, many and difficult questions, as to the constitutional validity of statutes, and as to the effect of constitutional provisions in construing them, are presented for decision, none of which can arise in England. There are many classes of questions requiring decisions in the executive departments, besides those involving executive national common law and the construction of constitutions and statutes. These find a close analogy to the several classes of questions arising in the courts. A brief reference to some of those classes of questions arising in executive administration in connection with the accounting officers will serve to show the necessity of reported decisions thereon.

I. Parties seeking relief in the courts must necessarily inquire as to their (1) number, (2) location, (3) sessions, and (4) jurisdiction—(a) original and (b) appellate. There are many elementary treatises, and a multitude of reported cases on these subjects. So claimants seeking payment of their demands in the Treasury Department must make similar inquiries as to the officers or tribunals authorized to act thereon.

(1.) The six Auditors and the Commissioner of the General Land Office, provided by statute, respectively, constitute the first tribunals of original jurisdiction, charged with a duty to “receive and examine,” and “audit and settle” a designated class of accounts. (Rev. Stat., 276, 277, 446, 456; act June 14, 1878, 20 Stat., 130, sec. 4; 1 Lawrence, Compt. Dec., 2d ed., App., chaps. I–X, 411–505.)

(2.) The six Auditors are officers of the Treasury Department. (Rev. Stat., 276, 277.) The Commissioner of the General Land Office is an officer of the Interior Department. (Rev. Stat., 446, 456.)

(3.) These officers are, in legal contemplation, in permanent session.

(4.) The *original* jurisdiction of each is defined by statute. (Rev. Stat., 277, 456.)

a. This extends to a great variety of cases, most of which have been stated in detail. See 1 Lawrence, Compt. Dec., 2d ed., App., ch. I, 411; Sister Elizabeth’s Case, 2 Lawrence, Compt. Dec., 2d ed., 120. It is, of course, of the utmost importance that every claimant should be able to ascertain the proper Auditor to whom he shall make application, in all matters relating to the prosecution of his claim in this tribunal of original jurisdiction.

b. The First and Second Comptrollers, and the Commissioner of Customs, respectively, as to specified classes of claims, constitute the tribunals required to “examine” “accounts settled” by the proper Auditors and “to certify the balances arising thereon.”

The jurisdiction thus exercised by these officers, respectively, is, in some sense, *appellate*, though it is required as a matter of course, and now without any formal appeal, or proceeding in the nature of a writ

of, or petition in, error. (Rev. Stat., 191, 269, 273, 317.) The Auditor of the Treasury for the Post-Office Department [Sixth Auditor] certifies his own balances, and is, except in cases of appeal, his own comptroller. (Rev. Stat., 277, cl. *Seventh*.) The final decisions of these officers in certifying balances are generally "conclusive upon the Executive branch of the Government." (Rev. Stat., 191.) There is, however, an appeal proper from the decision of the Auditor of the Treasury for the Post-Office Department to the First Comptroller, "whose decision [thereon] shall be conclusive." (Rev. Stat., 270.)

The original and appellate jurisdiction, exercised in issuing and countersigning warrants, is a subject of much importance. (Bender's Case, 1 Lawrence Compt. Dec., 2d ed., 317; s. c., *Id.*, 391; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XII, 509; Artificial-Limbs Case, 2 Lawrence, Compt. Dec., 2d ed., 382.)

(5.) The disbursing officers, clerks, and agents authorized by law, pay many classes of claims on presentation or demand, and in this manner become tribunals of *original jurisdiction*. Thus, called Government bonds are paid on presentation to the Treasurer or assistant treasurers of the United States. (Police Case, 1 Lawrence, Compt. Dec., 2d ed., 74; Ashton's Case. *Id.*, 167, *note*; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XIV, 589; *Id.*, Introduction; *Id.*, App., ch. XV, 592; Otto's Case, 3 Lawrence, Compt. Dec., 296.) So interest coupons on such bonds are paid in the same manner. (Rhawn's Case, 1 Lawrence, Compt. Dec., 2d ed., 110; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XIII, 555.) Many salaries are paid by disbursing officers and clerks on pay-rolls, duly approved, and with the proper receipts showing payment. (1 Lawrence, Compt. Dec., 2d ed., App., ch. XV, 592; Evans's Case, 2 Lawrence, Compt. Dec., 2d ed., 1; Eveleth's Case, *Id.*, 20; Sister Elizabeth's Case, *Id.*, 120; Swamp-land Case, *Id.*, 140; Di Cesnola's Case, *Id.*, 146; Langford's Case, *Id.*, 271; Huidekoper's Case, *Id.*, 365; Indian-land Case, *Id.*, 369; Senate-disbursement Case, *Id.*, 404; Printers' Case, *Id.*, 509; Reward Case, *Id.*, 549). The accounts of these officers and clerks are settled by the proper Auditors and Comptrollers in the exercise of a jurisdiction in some cases appellate.

II. Parties seeking relief in the courts generally require the assistance of attorneys, counselors, solicitors, or proctors. These officers of the courts have rights, powers, duties, and liabilities, and are subject to judicial control, in a form described in treatises and reported cases. So claimants before the accounting officers of the Treasury Department frequently require the aid of attorneys, and there are various "regulations" and principles of law affecting such attorneys, their relations to the Department and to claimants, and their rights and duties, which require study and consideration. (Rev. Stat., 161, 183, 184-187, 190, 1778, 3477, 3478, 3479; Moyer's Case, 1 Lawrence, Compt. Dec., 2d ed., 116-136; Safford & Co.'s Case, *Id.*, 288; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XIII, 570; Dunnegan's Case, 2 Lawrence, Compt. Dec.,

2d ed., 95; Di Cesnola's Case, *Id.*, 142, 160; McAllister's Case, *Id.*, 167; Clift's Case, *Id.*, 187; Substituted Attorney's Case, 3 *Id.*, 313; 12 Op. Att. Gen., 66; 13 *Id.*, 150.)

III. In the courts the law of *pleading* is a complicated and important branch of legal science. The different forms of actions at law, in equity, and in admiralty, and the essential and proper parties to be brought before the court, are all subjects upon which there are valuable elementary treatises and numerous reported cases. In the prosecution of claims in the Treasury Department there are no such formal pleadings required as in the courts, but certain forms are essential, as to which some consideration is requisite. Questions of much difficulty arise as to the proper *parties* entitled to prosecute, or receive payment of, claims. (Klink's Case, 1 Lawrence, Compt. Dec., 2d ed., 242; Dana's Case, 2 *Id.*, 203; Allspach's Case, 2 *Id.*, 260; Leggett's Case, 2 *Id.*, 349; Lost Greenback Case, 3 *Id.*, 166; Keyser's Case, 4 *Id.*)

IV. In the courts *practice* is defined to be "the form, manner, and order of conducting and carrying on suits or prosecutions in the courts through their various stages, according to the principles of law and the rules laid down by the respective courts." (2 Bouvier, Law Dic., 357, Tit. Practice.) There are numerous and valuable works on practice in the courts.

In the prosecution of claims in the Treasury Department there is, to a certain extent, a system of *practice*, but by no means so complicated as in the courts. It involves or relates to (1) the manner and order of prosecuting claims,* (2) the form of evidence allowable and the mode of procuring it,† (3) the form and order of presenting it and of supporting it by oral argument, or by written or printed briefs,‡ (4) the successive steps taken by each accounting officer charged with any duty in relation to a claim,§ (5) the mode of securing a rehearing on rejected claims, in the nature of a new trial, or error in judicial proceedings,|| (6) the final action authorizing payment,¶ (7) the process by which payment is secured,** (8) the mode of revoking a draft before actual payment,†† (9) the action to be taken when payment is attempted to be in-

* (1) 1 Lawrence, Compt. Dec., 2d ed., App., ch. I, 424; 15 Op. Att. Gen., 139.

† (2) Rev. Stat., 184-187, 3622, 5438, 5483.

‡ (3) Rev. Stat., 161, 183, 184, 187, 190, 1778, 3477, 3478, 3479; Moyer's Case, 1 Lawrence, Compt. Dec., 2d ed., 116-136.

§ (4) 1 Lawrence, Compt. Dec., 2d ed., App., ch. I, 424.

|| (5) Rev. Stat., 191; act June 14, 1878, 20 Stat., 130, sec. 4; Rev. Stat., 269, 270, 273, 317; Kansas Case, 2 Lawrence, Compt. Dec., 2d ed., 314; Hobbs's Case, *Id.*, 553; Reward Case, *Id.*, 546; Wood's Case, 1 *Id.*, 9; Police Case, 1 *Id.*, 70; Ashton's Case, 1 *Id.*, 162; Crocker's Case, 1 *Id.*, 298; Georgia Case, 4 *Id.*

¶ (6) Rev. Stat., 191, 269, 305; Kansas Case, 2 Lawrence, Compt. Dec., 2d ed., 301; Georgia Case, 4 *Id.*; Reeside's Appeal, 4 *Id.*

** (7) Rev. Stat., 191, 269, 305; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XV, 592.

†† (8) Bender's Case (second), 1 Lawrence, Compt. Dec., 2d ed., 405; s. c., *Id.*, 351; 15 Op. Att. Gen., 198; Ridgway's Case, 18 Ct. Cl.

terfered with by courts,* and (10) many questions somewhat similar in character. (Rev. Stat., 161, 183-187.)

The practice as to set-offs, and the jurisdiction in relation thereto, are subjects regulated by statute and usage. (Kansas Case, 2 Lawrence, Compt. Dec., 2d ed., 301; Rev. Stat., 236, 1766; Act March 3, 1875, 18 Stat., 481; Shelley's Case, 3 Lawrence, Compt. Dec., 321; Ochiltree's Case, 4 *Id.*; Georgia Case, 4 *Id.*; Reeside's Appeal, 4 *Id.*)

As to claims certified to be due to the United States from debtors, including officers and corporations, several modes of inquiry exist. If the United States be also indebted to such persons, a set-off may be made by the accounting officers (Bonnafon and Norton's Case, 14 Ct. Cl., 484), or, if they omit to do so, the Secretary of the Treasury may make it (Georgia Case, 4 Lawrence, Compt. Dec.); and, if in such case the claimant denies his indebtedness to the United States, legal proceedings are required to be commenced in any court of competent jurisdiction to settle the controversy. (Act March 3, 1875, 18 Stat., 481; Rev. Stat., 1766.) There may be cases in which the United States is not required to commence suit. (Kansas Case, 2 Lawrence, Compt. Dec., 2d ed., 324.) When suit is brought against the United States in the Court of Claims by a claimant who is also indebted to the United States, the statute gives the court jurisdiction of—

All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court. (Rev. Stat., 1059.)

The United States may, in any of its courts, sue a debtor against whom a balance has been certified by a Comptroller; when all questions in controversy may be determined. But in such case no judgment can be rendered against the United States, and even if the proceedings show a balance against the United States, this is not conclusive on, but is subject to review by, the accounting officers. (Viser's Case, 1 Lawrence, Compt. Dec., 2d ed., 75.)

And the statute provides, that:

In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident. (Rev. Stats., 951; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XII, 538.)

V. In the courts the law of evidence is of the utmost importance, as shown by the numerous and able treatises on this subject.

There is a law of evidence in Treasury Department practice, different

* (9) Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 11; Klink's Case, *Id.*, 242; Safford & Co.'s Case, *Id.*, 262; Di Cesnola's Case, 2 *Id.*, 142; Halstead's Case, 3 *Id.*, 231; Keyser's Case, 4 *Id.*

in many respects from that which prevails in the courts. It has been said by the Secretary of the Treasury, that "the Treasury Department is admirably organized to pass upon accruing demands upon the Government and upon the accounts of disbursing officers. All its machinery and checks are adapted to this duty, and no serious complaint has been made, or is likely to be made, of the proper discharge of this duty." (1 Lawrence, Compt. Dec., 2d. ed., App., ch. XIV, 587.) The Court of Claims has in effect made the same declaration. Many of the claims presented to the accounting officers are for salaries. These are respectively paid on evidence that the officer has been appointed and duly qualified, and has entered on his duties. The evidence, which gives to Senators and Representatives in Congress a right to the authorized compensation, is fixed generally by statute. (Rev. Stat., 35-51; Shelley's Case, 3 Lawrence, Compt. Dec., 321; Contestant's Widow's Case, *Id.*, 328; Ochiltree's Case, 4 *Id.*) Many claims are allowed on the approval of certain officers, the effect of which approval in cases generally, is *prima facie* evidence of a right, and, in a few cases, conclusive. (Bender's Case, 1 Lawrence, Compt. Dec., 2d ed., 317, 334; Providence Hospital Case, *Id.*, 79; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XII, 509, 533; Artificial-limbs Case, 2 Lawrence, Compt. Dec., 2d ed., 382.) Many are supported by the oath of the claimant, and by other evidence including affidavits. Vouchers are required of every disbursing officer. (Rev. Stat., 1762, 3622, 5438, 5483.) Provision is made for the examination of witnesses. (Rev. Stat., 184-187.) Investigations are authorized in the most ample manner. (Rev. Stat., 183.) And the Comptrollers are required to decide what are legal vouchers. (McAllister's Case, 2 Lawrence, Compt. Dec., 2d ed., 184.)

VI. Parties seeking relief in the courts, and those against whom jurisdiction is invoked are deeply interested in ascertaining the character and effect of the relief to be granted, the judgment or decree to be rendered, and the mode of enforcing it. This involves the law of judgments and decrees—interlocutory and final—, the law of executions, and the law of *res adjudicata*. On these subjects there are numerous and valuable works.*

In the accounting system of the Treasury Department claimants and debtors are equally interested in analogous questions.

A Comptroller, in certifying a balance due to a claimant, in effect renders a decree or judgment. For all purposes of executive administration his judgment is conclusive on all executive officers and on the claimant. This effect rests on the principle, that, when a special authority is given by statute to an executive officer, to be exercised in his discretion and judgment, and he has exercised such authority, it is final and conclusive. (Exigency Case, 3 Lawrence, Compt. Dec., 97; *Ex parte*

* There are works on Judgments by Bigelow, Freeman, and Ram: there are works on Executions by Herman, and Freeman: and there is a work on Res Adjudicata and Stare Decisis by Wells.

Randolph, 2 Brock., 473; Johnson *v.* Towsley, 13 Wall., 72; Georgia Case, 4 Lawrence, Compt. Dec.; Reeside's Appeal, *Id.*; 1 Lawrence, Compt. Dec., 2d ed., App., ch. XII, 548.) The common-law principle of conclusiveness is also settled by the declaratory act of March 30, 1868 (15 Stat., 54; Rev. Stat., 191). Such judgment of a Comptroller is, for all purposes of executive authority, a complete *res adjudicata*, which cannot be opened or changed. This results from the principle that a special power once exercised is exhausted.

Thus, in *ex parte* Randolph (2 Brock., 473) it is said:

After the Auditor shall once have settled an account of a public officer, *and closed it*, as in this case, is it competent *for him* at an after time, upon an allegation of error, or omission, or for other cause, to open it, re-state it, and upon the account thus re-stated, to institute proceedings * * * [*&c.*]? I think it is not. * * *. I take it to be a sound principle, that when a special tribunal is created with limited power, and a particular jurisdiction, that whenever the power given is once executed, the jurisdiction is exhausted and at an end—that the person thus invested with power is in the language of the law, *functus officio*.

This language is cited with approval by the Attorney-General in an opinion May 19, 1862 (10 Op. Att. Gen., 259). See Crepps *v.* Durden, 2 Cowper, 640; Mills *v.* Collett, 6 Bing., 85; s. c., 19 Eng. Com. Law Rep., 11-14. Many of the authorities on the conclusive effect of the action of accounting officers are collected elsewhere. (Georgia Case, 4 Lawrence, Compt. Dec.; Exigency Case, 3 *Id.*, 97; Kansas Case, 2 *Id.*, 2d ed., 301; Murray's Lessee *et al.* *v.* Hoboken Land and Improvement Co., 18 How., 281; Ballance *v.* Forsyth *et al.*, 24 How., 183; McKee *v.* United States, 12 Ct. Cl., 534; Oneale *v.* Thornton, 6 Cr., 53; s. c., 1 Cr. C. C., 269.)

It was said by Attorney-General Black, June 4, 1857 (9 Op. Att. Gen., 34), in the case of an account settled by the proper executive officers:

If it has been once heard and determined by the proper officer, there can be no propriety in opening it anew. This rule is well settled, and ought to be strictly adhered to. There must be an end at some time or another even of a claim against the Government. *Interest reipublicæ ut sit finis litium*, is a maxim as applicable to public creditors, urging their claims upon an executive department, as to any other class of litigants. It is not only the public interest but a public necessity that one fair hearing and one deliberate judgment on a question of this kind should preclude all further inquiry.

The maxim, *interest reipublicæ ut sit finis litium*, may possibly be an element of the policy which makes the judgment of a Comptroller final, but it is not the controlling reason, for that has already been stated. The finality of *judicial* judgments and decrees rests on the maxim just quoted. Thus, it has been said by Broom, in his work on Legal Maxims (331), after quoting this maxim, that "It is for the public good that there be an end to litigation; and if there be any one principle of law settled beyond all question it is this, that whensoever a cause of action, in the language of the law, *transit in rem judicatam*, and the judgment thereupon remains in full force and unreversed, the original cause of action is merged and gone forever." And again (343): "We have in

the preceding remarks, endeavored to point out the most direct application in civil proceedings of the rule that a man shall not be *bis vexatus*, which rule is in fact included in the general maxim—*interest reipublicæ ut sit finis litium*." Personal litigation is liable to result in personal and neighborhood strife. The same results do not generally follow adjudications by accounting officers. Hence there is difference between the reasons for the rule of *res adjudicata* as applied to adjudications by the accounting officers and those by the courts, respectively. See *Bell v. McCulloch*, 31 Ohio St., 399.

The same conclusive effect follows the judgment of a comptroller charging a private person, corporation, or state, with a liability. (Rev. Stat., 236; *Kansas Case*, 2 Lawrence, Compt. Dec., 2d ed., 301.)

There are some accounts in which a balance certified by a comptroller is not final and conclusive. Thus, there may be running accounts, on which payments may be erroneously made, and which are open to correction on final settlement. Some questions relating to this class of accounts are exceedingly difficult and embarrassing. (Butler, Att. Gen., May 3, 1834, 2 Op., Att. Gen., 650; Cushing, February 25, 1857, 8 *Id.*, 409; Black, June 4, 1857, 9 *Id.*, 35; Bates, April 25, 1862, 10 *Id.*, 235; Williams, July 10, 1874, 14 *Id.*, 412; *Swift Co. v. United States*, 105 U. S., 695; *Star Route Case*, 2 Lawrence, Compt. Dec., 2d ed., 455; 3 Williams, Executors, 6th Am. ed., 2060, 2168, and notes with many authorities cited; *Reeside's Appeal*, 4 Lawrence, Compt., Dec.)

The execution of the judgment of a Comptroller in certifying a balance due a claimant is by warrant for payment granted by the Secretary of the Treasury (Rev. Stat., 248), and countersigned by the First Comptroller (Rev. Stat., 269). This is subject to be recalled, and the certified balance may be corrected at any time before final payment. (*Bender's Case*, 1 Lawrence, Compt. Dec., 2d ed., 351, 405; 10 Op., Att. Gen., 235; 15 *Id.*, 198.) This power exists, because, until payment, the power is not exhausted. (*Ex parte Randolph*, 2 Brock., 473.)

In *Ridgeway's Case* (18 Ct. Cl.), the authority of the Commissioner of Internal Revenue to revoke his allowance of a claim was considered, and Richardson, Judge, said:

The power to revoke orders and decrees by courts and public officers under certain circumstances has frequently been recognized and upheld. The only question is as to when that power expires by the consummation of the first acts beyond recall. It was said by the Supreme Court in *Bronson v. Schulten* (104, U. S., 415):

"It is a general rule of the law that all the judgments, decrees, or other orders of the courts, however conclusive in their character, are under the control of the court which pronounces them during the term at which they are rendered or entered of record, and they may then be set aside, vacated, modified, or annulled by that court. But it is a rule equally well established that after the term has ended all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify, or correct them."

There are no terms for the transaction of business in the Internal Revenue Bureau. There are terms of service of the official head of the Bureau, and frequent changes therein. But the question whether or not a Commissioner is without authority to revoke the decisions and orders of any of his predecessors does not arise in this case,

since the allowance sued upon and its revocation were both made by the same Commissioner during his official term of service.

Several cases have heretofore arisen as to the power of the President to revoke a dismissal of a military officer. In *Corson v. The United States* (17 Ct. Cl., 349), where that subject was under consideration, it was said, referring to the decided cases:

"The purport of all these decisions is that the President, having once dismissed a military officer or accepted his resignation and given notice thereof, *so that nothing remains to be done to make the severance complete*, cannot again restore him to office except by a new appointment in pursuance of a nomination to and confirmation by the Senate."

The statute under which the Commissioner first certified to an allowance in this case provides that: "The Commissioner * * * *may refund and pay back all taxes erroneously or illegally assessed or collected*," &c.

Until, therefore, the taxes were paid back the action of the Commissioner authorized by the statute was not consummated. The sending of his order to the accounting officers in the course of departmental business did not place it beyond his power of recall. They are officers of the same Department as the Commissioner, and under the same official head. Their duties are to examine accounts and place them in a condition for payment. The processes of the Treasury Department are all *ex parte*, and are not finally consummated beyond recall until a check has been issued upon a warrant, duly signed by the Secretary of the Treasury, as we have pointed out in former cases. (*McKnight's Case*, 13 Ct. Cl., 292; *Buffalo Bayou R. R. Case*, 16 Ct. Cl., 245.)

In *Reeside's Appeal* (4 Lawrence, Compt. Dec.), it is said:

That there is authority to recall a settlement having a balance certified in favor of a creditor of the United States, and before payment thereon. (*Bender's Case*, Second, 1 Lawrence, Compt. Dec., 2d ed., 405; *Bates*, Att. Gen., April 25, 1862; *Dart's Case*, 10 Op. Att. Gen., 235; *Taft*, Feb. 7, 1877; 15 Op. Att. Gen., 198.) When a draft is issued and indorsed to a *bona fide* holder, in payment of such balance, it is too late to recall the settlement.

When a balance is certified in favor of the United States against a private person, corporation, or State, it may be satisfied by set-off, whenever money may be subsequently found due such person, corporation, or State from the United States, or it may be enforced by action in court, so far as such action may be maintainable. (*Kansas Case*, 2 Lawrence, Compt. Dec., 2d ed., 326.)

On all these subjects, as connected with the courts, there are many and valuable works by learned and able law writers, and thousands of volumes of reported decisions. Judges and lawyers can point to any one of these monuments of learning and say *si monumentum quæris circumspice*. To some extent, similar monuments of learning, on all questions affecting the executive departments of the national Government, the principles of law therein established and adopted, and the practice therein, are to be erected. The questions considered in this series of opinions and decisions of the First Comptroller may furnish some suggestions, from which learned writers may be aided in putting into form the legal science pertaining to the great Departments of the Government. The claims disposed of each year in these Departments are larger in amount and number than those litigated annually in all the national courts, and require the skill and learning, probably, of almost as many lawyers at the Capitol and in various parts of the United States.

In this connection it may be proper to notice another subject of great importance, which it is always necessary to understand, and on which the action and decision of the First Comptroller are *sometimes* required—THE RELATION OF THE ACCOUNTING OFFICERS TO JUDICIAL AUTHORITY. This relation arises in several forms, which may be separately, but very briefly, noticed under four general heads—(1) judicial authority exercised in aid of accounting officers, (2) judicial authority exercised directly against them, (3) judicial authority seeking to affect their action on claims, and (4) judicial authority affecting claims after the final action of the accounting officers thereon.

I. The jurisdiction of the courts may be invoked in *aid of the accounting officers* in several forms, which will be briefly referred to.

1. EVIDENCE.—Evidence to enable accounting officers to pass upon claims may be procured through the agency of the judges and courts. (Rev. Stat., 183–187.) Whether the aid thus given be an exercise of purely judicial authority, which Congress may *require*, or whether it is only exercised by *comity*, is now immaterial. (The United States *v.* Ferreira, 13 How., 40; Hayburn's Case, 2 Dallas, 410, *note*.)

2. INTERPLEADER.—Whenever the rightful ownership of a Government bond or other claim against the United States is in dispute between rival claimants, a bill of interpleader may be filed by the United States, to determine the question. (Vermilye & Co., *v.* Adams Express Co., 21 Wall., 139; Dugan *v.* United States, 3 Wheat., 172; United States *v.* Buford, 3 Pet., 12; Benton *v.* Woolsey *et al.*, 12 *Id.*, 27; Texas *v.* White, 7 Wall., 732; Texas *v.* Hardenberg, 10 *Id.*, 68; Commonwealth *v.* Emigrant Industrial Savings Bank and another, 98 Mass., 12; The United States *v.* Bank of the Metropolis, 15 Pet., 401.)

3. There may, perhaps, as to such bonds and claims, be some cases in which controverted questions of ownership arise, when accounting officers will withhold action until the rival claimants, by a proceeding in court, obtain a decree to determine their rights *inter se*. It is possible, if not probable, that such decree may not be conclusive on accounting officers. Even after such decree, new evidence might be found affecting ownership. And it is clear that no such decree can bind the Government, which cannot be a party to it. It would seem, that such aid for accounting officers might be more appropriately invoked in cases in which the rights of rival claimants rest on *equitable* grounds, since, as a general rule, only the *legal* rights of parties are examined in the Treasury Department. (Kellogg *v.* United States, 7 Wall., 363; 3 Op. Att. Gen., 29; 5 *Id.*, 86; 11 *Id.*, 7.) Government bonds are sometimes held by parties in trust, at a specified time to transfer them to *cestuis que trust*. Complicated questions arise in case of the death of one or more of several trustees, and also as to the rights of *cestuis que trust*. It may become necessary, by a judicial proceeding, to appoint successors in the trust, and otherwise to determine the rights of the parties, in order that accounting officers may make transfers or payments of the bonds. (Bond Trust Case, 2

Lawrence, Compt. Dec., 2d ed., 201; Bond Continuance Case, *Id.*, 218; Trustee Survivorship Case, *Id.*, 232; Tayloe's Case, 3 *Id.*, 190.) Some of the authorities on this subject are collected in Keyser's Case, 4 Lawrence, Compt. Dec. (*Combs v. Hodge et al.*, 21 How., 397; *Texas v. White*, 7 Wall., 700; *Texas v. Hardenberg*, 10 *Id.*, 68; *Clark v. Clark et al.*, 17 How., 315; *Board of Liquidation et al. v. McComb*, 92 U. S., 531; *Walker v. Smith*, 21 How., 579; *Milnor et al. v. Metz*, 16 Pet., 221.)

4. Some claims, upon the request of the proper Auditor or Comptroller, and others by the head of the proper Executive Department, may be referred to the Court of Claims for the action and judgment of said court. (Rev. Stat., 1063; Police Case, 1 Lawrence, Compt. Dec., 2d ed., 57; Delaware River Steamboat Co.'s Case, 5 Ct. Cl., 55; The Winnisimmet Co.'s Motion, 12 *Id.*, 319; McKnight's Case, 13 *Id.*, 309.)

5. The act March 3, 1883 (22 Stat., 485, sec. 2), provides :

That when a claim or matter is pending in any of the Executive Departments which may involve controverted questions of fact or law, the head of such Department may transmit the same, with the vouchers, papers, proofs, and documents pertaining thereto, to said court [Court of Claims], and the same shall be there proceeded in under such rules as the court may adopt. When the facts and conclusions of law shall have been found, the court shall not enter judgment thereon, but shall report its findings and opinions to the Department by which it was transmitted for its guidance and action.

This does not repeal any statute giving authority or jurisdiction to accounting officers. It leaves their authority unimpaired and their duties unaffected. The "findings and opinions" of the court will doubtless generally be followed in the Executive Departments; and, while they are to be reported to the proper Department "for its guidance and action," they are not declared conclusive. If they had been so intended, the law would have authorized the court to render judgment, as in other cases. The fact that it does not is clear evidence of a purpose to make the action of the court subject to revision. This act refers to "a claim or matter * * pending in any of the Executive Departments." If a claim, transmitted under this act to the Court of Claims, is pending in the Interior Department, the "findings and opinions" of said court will be reported to said Department "for its guidance and action." But, after this, the claim must pass to the proper accounting officers of the Treasury Department for their independent action. The act thus seems more especially designed to aid, in the performance of their duties, those officers of Executive Departments who are not accounting officers. This may be reasonably inferred from its language, and from the fact that it applies to all Executive Departments alike, and that the accounting officers are only in the Treasury Department. It would perhaps seem, therefore; that it can have no application in the Treasury Department beyond that which it provides for other Departments. But it will doubtless furnish valuable aid to the accounting

officers. The learning and ability of the eminent judges of the Court of Claims furnish a sufficient guarantee of this.

6. Reference has already been made to the act of March 3, 1875 (18 Stat., 481), upon the subject of set-off. And the duty of accounting officers, and of the Secretary of the Treasury, as related to such officers, has been somewhat considered, in the cases above cited, on this subject, (Georgia Case, 4 Lawrence, Compt. Dec.; Reeside's Appeal, *Id.*

II. Judicial authority exercised directly against accounting officers.

Judicial proceedings against accounting officers may be by (1) *mandamus*, (2) injunction, (3) civil action, or (4) criminal prosecution.

1. MANDAMUS.—An application for a writ of *mandamus* by claimants against the United States frequently presents questions between the courts and the accounting officers. In the exercise of the jurisdiction given by law to these officers, they are not subject to control by *mandamus*, as to the manner in which they shall exercise their official judgment or discretion. (The United States *v.* Guthrie, 17 How., 284; Brashear *v.* Mason, 6 *Id.*, 92; Decatur *v.* Paulding, 14 Pet., 497; Klink's Case, 1 Lawrence, Compt. Dec., 2d ed., 254.) But, "when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance." (Board of Liquidation *et al.* *v.* McComb, 92 U. S., 531; Lower *et al.* *v.* United States *ex. rel.*, 91 U. S., 536; Kendall *v.* The United States, 12 Pet., 524.) So, when an accounting officer is required by law to exercise judgment and discretion as to an account, and he *refuses* to do so, he may be compelled by *mandamus* to perform his duty. (*Ex parte* Russell, 13 Wall., 670; Commissioner of Patents *v.* Whiteley, 4 *Id.*, 534; Reeside *v.* Walker, 11 How., 272.)

2. INJUNCTION.—An application for a writ of injunction also frequently presents questions between the courts and the accounting officers.

This writ will not lie to control accounting officers in exercising their judgment or discretion on matters, when such exercise is required of them by law. (Gaines *v.* Thompson, 7 Wall., 347; Walker *v.* Smith, 21 How., 579; Keyser's Case, 4 Lawrence, Compt. Dec.) But, when a plain official duty requiring no exercise of discretion is to be performed, and such duty is threatened to be violated by some positive unauthorized official act, any person, who will sustain personal loss or injury thereby for which adequate compensation cannot be had at law, may have an injunction to prevent its performance. (Board of Liquidation *et al.* *v.* McComb, 92 U. S., 531.)

On the general power of courts by injunction, as affecting claims to be passed upon by accounting officers, some authorities are collected in Keyser's case (4 Lawrence, Compt. Dec.), and in Klink's Case (1 *Id.*, 2d ed., 254, *note*).

3. CIVIL ACTION.—Some officers incur a civil liability in damages for a malicious act exercised without authority. An action will not lie against a judge for any matter done by him in the exercise of his judicial functions. The Comptrollers are *quasi* judicial officers. (1 Lawrence, Compt. Dec., 2d ed., Introduction; *Id.*, App., ch. XII, 537, 546.) The jurisdiction they exercise is “due process of law.” (Murray’s Lessee *et al.* v. Hoboken Land, &c., Co., 18 How., 272; Hambleton v. Dempsey & Co., 20 Ohio, 168; Georgia Case, 4 Lawrence, Compt. Dec.) Some of the cases upon the liability of officers will be found collected in Receiver’s Case. (1 Lawrence, Compt. Dec., 2d ed., 375, *note.*)

4. CRIMINAL PROSECUTION.—Accounting officers are subject to criminal laws against official corruption.

III. Judicial authority affecting claims pending for the consideration of accounting officers.

Judicial proceedings have been frequently instituted (1) to determine the conflicting rights of parties, or (2) to assert some interest in, or (3) lien upon, claims pending before accounting officers, and indirectly to affect their decision thereon. No decree made in such case by a court can control the action of accounting officers, or affect their judgment, or require payment to any party, or in any form, other than that determined by the proper Comptroller. This subject is discussed and authorities cited in Keyser’s case (4 Lawrence, Compt. Dec.). The effect of such judicial action, as between the parties thereto, and in relation to money arising from a claim against the United States after its payment by the Treasurer or other disbursing officer, is not to be determined by accounting officers, but by the courts. The rights of claimants against the United States may be indirectly affected by the judgment of a court, but this is not conclusive on accounting officers. (Viser’s Case, 1 Lawrence, Compt. Dec., 2d ed., 75.)

IV. Judicial authority affecting claims after the final action of accounting officers thereon.

1. A claimant, whose claim is rejected by accounting officers, or allowed for a sum less than the claimant asserts or believes to be due, has a judicial remedy in specified cases. And there is a judicial remedy in some other cases. Thus, the Revised Statutes provide, as follow:

SEC. 1059. The Court of Claims shall have jurisdiction to hear and determine the following matters:

First. All claims founded upon any law of Congress, or upon any regulation of an Executive Department, or upon any contract, expressed or implied, with the Government of the United States, and all claims which may be referred to it by either House of Congress.

Second. All set-offs, counter-claims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever, on the part of the Government of the United States against any person making claim against the Government in said court.

Third. The claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors,

for relief from responsibility on account of capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, or papers in his charge, and for which such officer was and is held responsible.

Fourth. Of all claims for the proceeds of captured or abandoned property, as provided by the act of March 12, eighteen hundred and sixty-three, chapter one hundred and twenty, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," or by the act of July two, eighteen hundred and sixty-four, chapter two hundred and twenty-five, being an act in addition thereto: *Provided*, That the remedy given in cases of seizure under the said acts, by preferring claim in the Court of Claims, shall be exclusive, precluding the owner of any property taken by agents of the Treasury Department as abandoned or captured property in virtue or under color of said acts from suit at common law, or any other mode of redress whatever, before any court other than said Court of Claims: [*Provided, also*, That the jurisdiction of the Court of Claims shall not extend to any claim against the United States growing out of the destruction or appropriation of, or damage to, property by the Army or Navy engaged in the suppression of the rebellion.]

SEC. 1063. Whenever any claim is made against any Executive Department, involving disputed facts or controverted questions of law, where the amount in controversy exceeds three thousand dollars, or where the decision will affect a class of cases, or furnish a precedent for the future action of any Executive Department in the adjustment of a class of cases, without regard to the amount involved in the particular case, or where any authority, right, privilege, or exemption is claimed or denied under the Constitution of the United States, the head of such Department may cause such claim, with all the vouchers, papers, proofs, and documents pertaining thereto, to be transmitted to the Court of Claims, and the same shall be there proceeded in as if originally commenced by the voluntary action of the claimant; and the Secretary of the Treasury may, upon the certificate of any Auditor or Comptroller of the Treasury, direct any account, matter, or claim, of the character, amount, or class described in this section, to be transmitted, with all the vouchers, papers, documents, and proofs pertaining thereto, to the said court, for trial and adjudication: *Provided*, That no case shall be referred by any head of a Department unless it belongs to one of the several classes of cases which, by reason of the subject-matter and character, the said court might, under existing laws, take jurisdiction of on such voluntary action of the claimant.

2. After claims have been finally allowed claimants in the Treasury Department, and before actual payment thereof, creditors of such claimants sometimes seek, by judicial proceedings, to have the money applied to the satisfaction of their debts. This subject has been discussed to some extent in Keyser's Case (4 Lawrence, Compt. Dec.). In this case it is shown, that, after a claim against the United States has been paid by the proper executive officer to such party as he determines to be entitled to payment, *then* the judicial authority may determine whether some other person has an *equitable* right to the fund, and, if so, may decree accordingly, since executive officers generally consider only the *legal* rights of claimants. (Kellogg v. United States, 7 Wall., 363; 5 Op. Att. Gen., 85.) The relation of executive to judicial authority has been considered in many cases. (Johnson v. Towsley, 13 Wall., 72; Draft Case, 1 Lawrence, Compt. Dec., 2d ed., 11; Keyser's Case, 4 *Id.*; 1 Op. Att. Gen., 681-684; 3 *Id.*, 531, 718; 7 *Id.*, 80; 16 *Id.*, 367.)

3. In settling the accounts of disbursing and other officers in the Treasury Department, balances are sometimes certified against them. When suit is brought on their bonds, or otherwise, to recover the amount so certified, the action of the Comptroller is open to inquiry in such suit. (Viser's Case, 1 Lawrence, Compt. Dec. 2d ed., 75; Martin's Case, 2 *Id.*, 332; Hobbs's Case, 2 *Id.*, 553.) The effect of certified balances as *evidence* in judicial proceedings in certain cases is prescribed by section 886 of the Revised Statutes, and numerous decisions have been made thereon. (McKnight's Case, 13 Ct. Cls., 310.) In actions against the United States such balances are not evidence. (Malakof Bitters Case, 3 Lawrence, Compt. Dec., 136, *note*.) When balances are certified in favor of the United States (Rev. Stat., 236), and an action is brought thereon against the debtor, the whole subject is open to judicial inquiry.

The general rule is, that the courts cannot in any respect control, interrupt, or interfere with accounting, or other executive, officers in the exercise of the jurisdiction conferred upon them by law, and requiring the employment of their judgment and discretion.

In Murray's Lessee *et al. vs.* Hoboken Land and Improvement Company (18 How., 272, 281), it was decided that the adjustment of claims against the United States is "an exercise of executive and not of judicial power," and that judicial power, as to them, is only exercised by virtue of the act of May 15, 1820 (3 Stat., 592).

The clear inference from this statute is, that it was deemed necessary, because, without it, there could be no judicial interference to determine the rights of claimants prior to the final action of the Treasury Department.

The judicial decisions defining the extent of judicial authority lead to the same conclusion. The effect of them all may be summed up in a few words :

The courts cannot interfere with executive officers in the exercise of a statutory power to examine, allow, and pay claims, when its performance requires of such officers the employment of their judgment and discretion.

When there are rival claimants demanding payment of the same claim, and executive officers make payment to the wrong claimant, a court having jurisdiction of the parties and subject-matter may, after such payment, as between the parties or others charged with notice, give relief to the rightful claimant.

After the allowance of a claim by the proper executive officers, the grant of a Treasury warrant for payment thereof, and the issue of a draft thereon, no court can by decree determine to which of two or more rival claimants payment of such draft shall be made by the executive officers, so as to require them to make payment in accordance therewith. But in such case, a court having jurisdiction of all parties in interest by personal service of process may by decree deter-

mine the rights of the parties *inter se*, which decree will be operative on them, after payment, to determine the right to the fund. Executive officers are not bound to await the final decision of such proceeding before making payment; but will generally respect such decision, if made before payment, in two classes of cases: *first*, when the *equitable* title of a claimant is determined, because, as a general rule, accounting officers deal only with *legal* rights (*Kellogg v. United States*, 7 Wall., 363; 3 Op. Att. Gen., 29; 5 *Id.*, 86; 11 *Id.*, 7); and *second*, when the fund, from which payment is to be made, is held by the United States as a *trust*, such trust being a subject of equity jurisdiction.

And a decree may perhaps be made *in personam*, requiring an assignment of such claim, after the issue of a Treasury warrant and draft, when the right to such assignment is based on an equitable title. Such actual assignment would, of course, be respected by executive officers in making payment.

The authorities, upon the exercise of judicial power by *mandamus*, support these views. Thus, in *The United States v. Guthrie* (17 How., 303), in which an effort was made to require an executive officer to pay a claim against the United States, it is said:

The only legitimate inquiry for our determination upon the case before us is this: Whether, under the organization of the federal government, or by any known principle of law, there can be asserted a power in the circuit court of the United States for the District of Columbia, or in this court, to command the withdrawal of a sum or sums of money from the treasury of the United States, to be applied in satisfaction of disputed or controverted claims against the United States? This is the question, the very question presented for our determination; and its simple statement would seem to carry with it the most startling considerations, nay, its unavoidable negation, unless this should be prevented by some positive and controlling command; for it would occur, *a priori*, to every mind that a treasury not fenced round or shielded by fixed and established modes and rules of administration, but which could be subjected to any number or description of demands, asserted and sustained through the undefined and undefinable discretion of the courts, would constitute a feeble and inadequate provision for the great and inevitable necessities of the nation. The government under such a *régime*, or, rather, under such an absence of all rule, would, if practicable at all, be administered not by the great departments ordained by the Constitution and laws, and guided by the modes therein prescribed, but by the uncertain, and perhaps contradictory action of the courts in the enforcement of their views of private interests.

The principle thus stated applies equally when there are two or more rival claimants, each demanding payment.

The authorities which define the extent of judicial power by *mandamus* are numerous.

These principles are recognized in other cases, which show that no court can interfere with executive officers, or control the exercise of their judgment and discretion in the issue of patents for land, but that after such officers have *fully executed their authority*, courts may determine which of two claimants has the real legal or equitable title to the land.

Thus, in *Johnson v. Towsley* (13 Wall., 72, 85), it was shown that

Towsley, on the 15th of June, 1858, made a pre-emption claim to certain land. On the 5th of October, 1860, Johnson also made a pre-emption claim.

The Secretary of the Interior decided that Johnson was entitled to the land, and a patent accordingly issued to him.

Towsley filed a bill in chancery, and the court decreed that the *patent to Johnson be canceled*, and that the title be vested in Towsley.

The Supreme Court of the United States held, in effect, that Towsley had a perfect equitable title, and that a court of equity would review the action of the officers charged with the duty, under the pre-emption law, of issuing a patent.

The court, referring to the decision of the land officers in favor of a party applying to enter land as a pre-emptor or otherwise, their acceptance of his money and certification of his right to a patent, said :

Undoubtedly this constitutes a *vested right*, and it can only be divested according to law. In every such case, where the land office afterwards sets aside this certificate, and grants the land thus sold to another person, it is of the very essence of judicial authority to inquire whether this has been *done in violation of law*, and, if it has, to give appropriate remedy.

And the syllabus of this case (sec. 8) says :

The decisions of this court on this subject establish :

- i. That the judiciary will not interfere by mandamus, injunction, or otherwise with the officers of the land department in the exercise of their duties, while the matter remains in their hands for decision.
- ii. That their decision on the facts which must be the foundation of their action, unaffected by fraud or mistake, is conclusive in the courts.
- iii. But that after the title has passed from the Government to individuals, and the question has become one of private right, the jurisdiction of courts of equity may be invoked to ascertain if the patentee does not hold in trust for other parties.

Numerous authorities are cited in this case: *Garland v. Wynn*, 20 How., 8; *Lytle et al. v. State of Arkansas et al.*, 22 *Id.*, 193; *Lindsey et al. v. Hawes et al.*, 2 Black, 559; *Green v. Liter*, 8 Cranch, 229; *Finley v. Williams*, 9 *Id.*, 164; *McArthur v. Browder*, 4 Wheat., 488; *Hunt and others v. Wickliffe*, 2 Pet., 201; *The State of Minnesota v. Bachelder*, 1 Wall., 109; *Silver v. Ladd*, 7 *Id.*, 219.

And see cases in House Mis. Docs. No. 42, 1st Sess. 47th Congress, June 23, 1882, No. 10, 2d Sess. 47th Congress, Dec. 16, 1882, per Lawrence *arguendo*, and *Neer v. Williams*, 27 Kansas, 1, per Lawrence *arguendo*.

Attorney-General Butler, December 7, 1835 (3 Op. Att. Gen., 30), in considering a case in which payment of a claim against the United States was demanded by an executor, and also by a party claiming to be the equitable owner thereof, said : "The executor, being the legal representative of the owner, is *prima facie* the person entitled to receive the money from the Government; and though, in all such cases,

where assignments have been made in apparently due form, and no objection is made to the right of the assignee, it would be proper to make payment to the assignee; yet whenever the validity of the assignment is impeached, and conflicting claims exist, it is undoubtedly the safest course to *pay to the person legally entitled*, and to leave all parties *having equitable claims* to their appropriate remedies in the courts of justice. Whether, in the present case, it might not be just to retain the moneys until the parties claiming under assignments * * * can have opportunity to obtain the decision of a competent tribunal on the validity of their claims, is a question of discretion, which belongs exclusively to * * * [the Treasury] Department to determine." See 1 Op. Att. Gen., 681-684; 3 *Id.*, 531, 718; 7 *Id.*, 80.

This was prior to the acts of July 29, 1846 (9 Stat., 41), and February 26, 1853 (10 Stat., 170), now section 3477 of the Revised Statutes, which makes all assignments of claims against the United States void, "unless they are freely made * * *, after * * * the issuing of a warrant for the payment thereof." (Di Cesnola's Case, 2 Lawrence, Compt. Dec., 2d ed., 153.) But the opinion cited illustrates the rule, that accounting officers are generally only required to look to the legal title of claimants. Payment to the holder of the equitable title may estop the holder of the legal title, when assenting thereto, from thereafter asserting a right to payment. (Claims Assignment case, 3 Lawrence, Compt. Dec., 28.) •

The accounting officers, (1) to a certain extent, settle principles of law which are recognized in the courts,* and, (2) in some cases, their action is conclusive on the courts.†

The decisions of the Supreme Court of the United States, so far as they settle individual rights in particular cases, or determine general principles of law, should, in the main, be regarded as finally authoritative.

The decisions of other courts may settle the rights of parties in particular cases, and the general principles therein asserted are always entitled to respect, but they are not, necessarily, to be adopted by the accounting officers of the Treasury Department. In view of the many conflicting decisions this could not be otherwise. And the law has given accounting officers a jurisdiction over which they are to exercise their own judgment. The publication of the decisions of the First Comptroller may at least aid in securing greater care in the consideration of questions submitted to him, and in the statement of general principles. It may also furnish Congress with a means of supplying needed legislation in the public interest, and, as a part of this, of changing any practice or principle, adopted by accounting officers and found to be inexpedient.

Each one of the topics herein mentioned leads into details, and to cognate subjects, affording a wide scope for ample discussion and

* (1). See note *, *ante*, XXV.

† (2). See note †, *ante*, XXIV.

elucidation. Cases will necessarily arise in the executive departments of the Government requiring decisions on many questions alluded to under the several heads already mentioned.

In view of these considerations, it is hoped that the pages which follow may be of some service in the Departments, and to parties interested in the questions therein decided.

WILLIAM LAWRENCE,
First Comptroller.

TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE, }
December 31, 1882.

DECISIONS

OF

THE FIRST COMPTROLLER (WILLIAM LAWRENCE) IN THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES.

1882.

IN THE MATTER OF WITHHOLDING FOR BENEFIT OF CONTRACTOR A PENALTY STIPULATED FOR IN A SUBCONTRACT FOR CARRYING MAILS.—
DORSEY'S APPEAL.

1. When a subcontractor carrying mails is entitled to be paid therefor a less sum than the original contractor, the latter, if he be entitled to payment of the residue, may appeal to the First Comptroller from the settlement of the account of the subcontractor made by the Auditor of the Treasury for the Post-Office Department.
2. A clause in a subcontract for carrying mails, declaring that ninety days' notice shall be given by the subcontractor to the contractor of any intention to cease carrying service, and that a failure to give such notice shall work a forfeiture of pay that may be due the subcontractor, and that the Sixth Auditor is authorized and directed to retain such sum for the use of the contractor, is void so far as it attempts to give authority to, or impose a duty on such Auditor.
3. A subcontract for carrying mails cannot impose a duty on an officer outside of, and beyond that prescribed by statute.
4. Accounting officers cannot declare forfeitures of rights for private persons *inter sese* in which the government has no interest, and in a form which might divest property beyond reclamation by judicial process.
5. The law does not sanction the enforcement of penalties for private parties *inter sese* beyond actual damages sustained, and which are not in their character liquidated damages.
6. The power of accounting officers to pass on claims for unliquidated damages considered.
7. A void clause of a contract may be severable from the residue of the provisions, when the latter are not in any material sense dependent on the former; and in such case the valid provisions may be enforced.
8. The Postmaster-General has authority to sanction a subcontract for carrying the mails, even though it may deprive the sureties of the contractor of the means of being indemnified against a liability for damages; and the liability of the sureties will, nevertheless, continue.
9. The Auditor of the Treasury for the Post-Office Department, in certifying balances, is not generally concluded by the amount approved by officers of the Post-Office Department.

March 28, 1878, John W. Dorsey, with sureties, made a contract with the United States, subject to the postal laws and regulations, to trans-

port the mail in the Star service on route No. 38113, from White River, Colorado, by Windsor and Dixon, to Rawlins, in Wyoming Territory, and back, once a week, at \$1,700 per year, from July 1, 1878, to July 1, 1882, on a schedule time of 108 hours, with a provision that service might be increased by the Postmaster-General at *pro rata* pay, and service "expedited" at *pro rata* pay, or decreased, curtailed, or diminished, with one month's extra pay in such case in accordance with law.

May 1, 1879, two additional trips per week were ordered, and service expedited from 108 hours to 45 hours to take effect May 12, 1879, and additional pay fixed at \$12,006.25 per annum.

October 15, 1880, a subcontract was made with the written consent of the Postmaster-General, between said Dorsey and Eugene Taylor, as subcontractor, with sureties, by which the subcontractor agreed to carry the mail on said route, as required by the original contract, from said date to July 1, 1882, for a compensation of \$10,000 per annum, for three trips per week, or \$20,000 for six, present schedule time, 45 hours each way, the rate of speed not to be increased under this contract; and the subcontractor was to be entitled to a *pro rata* increase of pay at above-named rate for all increased service ordered by the Post-Office Department; and if fines or deductions should be made by the Post-Office Department because the mails had not been carried promptly and securely, the subcontractor was to pay Dorsey all loss and damage which he might sustain in consequence thereof. The subcontract contains the following agreement in respect of such damage:

"It is agreed that ninety days' notice shall be given by the second party of any intention to cease carrying service on this route, and a failure to give such notice shall work a forfeiture of pay that may be due the second party, and the Sixth Auditor of the Treasury is hereby authorized and directed to retain such pay from the sum that may be due to the second party for the benefit and use of the first party."

It was provided, also, that the subcontractor was to transport the mail "upon such schedule time, and for such additional trips, as the Post-Office Department may from time to time direct, and in full and complete compliance with the requirements of the postal laws and the regulations of the Post-Office Department, * * * and subject to all requirements and liabilities of the said contractor."

The Auditor was duly notified of the filing of the subcontract. (Act May 17, 1878, sec. 3, 20 Stats., 61.)

The following orders were made by the Second Assistant Postmaster-General: No. 2170, March 8, 1881, to take effect from April 1, 1881: "increase service to seven trips per week, and allow contractor \$18,275 per annum additional pay, being *pro rata*, and allow subcontractor \$13,333.33 per annum additional pay, being *pro rata*;" and No. 12909, September 21, 1881, to take effect from October 1, 1881, to "restore original running time and deduct \$20,081.25 from annual pay of contractor, being the sum he is receiving for expedition, and \$14,651.14

from annual pay of subcontractor *pro ratâ*." From same date it reduced service to three times a week and deducted \$6,800 per annum from pay of contractor, and \$4,961.25 per annum from pay of subcontractor, being *pro ratâ*; and it allowed the contractor one month's extra pay on \$6,800 per annum only.

October 1, 1881, the subcontractor's agent demanded of the agent of the contractor that the latter put up \$1,000 per month, or \$9,000 for the remaining term of the contract, as security for the payment of the subcontractor, otherwise he would abandon the subcontract. October 7, 1881, the subcontractor ceased to perform service.

Order 14249, October 8, 1881, of the Second Assistant Postmaster-General, suspended the pay of the contractor and subcontractor, other service having been employed.

October 27, 1881, the Second Assistant Postmaster-General certified to the Sixth Auditor performance of the contract for the quarter ending September 30, 1881, without failures or delinquencies, and called his attention to the clause in the subcontract authorizing retention of pay of the subcontractor under certain conditions.

Order 15342, November 2, 1881, of the Second Assistant Postmaster-General terminated the recognition of Taylor's subcontract from October 6, 1881, and modified order 14249 so as to remove the suspension of the pay of the subcontractor.

November 12, 1881, the Sixth Auditor, by report No. 34959, stated an account on which a balance of \$5,833.33 was found to be due Eugene Taylor, subcontractor, per quarter, per contract from July 1 to September 30, 1881; and the Auditor thereupon certified to the Postmaster-General "that there is payable to the above-named subcontractor the amount specified agreeably to the provisions of the act of Congress approved May 17, 1878, and information received from the contract office."

November 14, 1881, the contractor, Dorsey, appealed to the First Comptroller, from the action of the Auditor in certifying as due the subcontractor \$5,833.33 instead of crediting the same to John W. Dorsey, the contractor, "as authorized and required to do by the subcontract, for failure to give 90 days' notice of intention to drop the service."

Order 17052, December 12, 1881, of Second Assistant Postmaster-General recognizes temporary service performed by Charles T. Perkins, from October 7 to November 27, 1881, 22 round trips at \$64.55 each, \$1,420; and it directs the Auditor to charge the contractor said sum of \$1,420, and rescinds order No. 14249 of October 8, 1881.

Mr. W. Lilley for Taylor.

1. The rights of the subcontractor and the authority of the Sixth Auditor are fixed by act of May 17, 1878, sec. 3 (20 Stat., 61). This gives authority to pay the earnings of the subcontractor to the original contractor in one case only, but is silent as to all others. If the pur-

pose of the statute had been to give the Auditor authority in any but the one case, it would have said so, and prescribed a mode of obtaining evidence.

2. This is not an appealable case. It is not a settlement of the accounts of Dorsey. (Rev. Stat., 270.)

The subcontractor incurred no forfeiture, and if he did he has a set-off which more than covers it.

4. The First Comptroller is not invested with authority to adjudge a forfeiture or provided with the means of ascertaining the necessary evidence.

Hon. *Robert G. Ingersoll* and Mr. *W. S. Bush* for Dorsey.

I. The Post-Office Department has assumed that the Auditor is subject to its decisions and orders in the settlement of accounts, and is bound by them, but this is not the law. "All expenses" are "subject to the settlement of the Auditor." (Rev. Stat., 396, 4055, 277; 7 Op., 439, 729, 488; 15 Op., 198; Postal Regulations of 1879, secs. 29, 59, 1140, 1141, 1142). These confer on the Auditor full power to determine the amount due contractors and to whom it shall be paid.

1. The order of September 21, 1881, is in violation of section 3958 of the Revised Statutes and is void. It made a new contract.

2. The order of October 8, 1881, suspending the pay of the contractor and subcontractor is in excess of the authority of the Second Assistant Postmaster-General and is void.

II. The Auditor is authorized to determine the amount due the contractor and subcontractor. The amount due the original contractor is only ascertained after it has been determined what liabilities he is under to the government. All that the subcontractor can receive is the balance due the original contractor after his liabilities are ascertained. (16 Op., 64.)

III. The order No. 15342, of November 2, 1881, was unauthorized. It is based on the conclusion that the clause of the subcontract authorizing the Auditor to retain from the subcontractor the amount due him, if he threw down the service without ninety days' notice, is surplusage. This is not the law.

1. The subcontract made an absolute release of the sum due the subcontractor, and the Auditor was no longer bound to certify it as due him. If any clause was surplusage, the whole contract is void, and the subcontractor would have no remedy but to go to the courts on a *quantum meruit*.

2. The sureties of the contractor have a right to demand this to indemnify them against any claim for fines, penalties, and forfeitures heretofore against Dorsey, and all claim for damages that may arise against the contractor for the failure of the subcontractor to fulfill his contract. Hence, the Auditor erred in certifying money due the subcontractor.

3. The Auditor must be governed by the subcontract. Any subcon-

tractor can release a claim, as in this case, on failure to give the stipulated notice. The Auditor cannot dispense with it. (*Reeside vs. United States*, 8 Wall., 43.) If this provision is illegal, then the provision in Dorsey's contract, that damages arising from the annulment of his contract may be assessed by the Auditor, is illegal.

4. The Auditor erred in auditing the account of the subcontractor and certifying it to the Postmaster General, before he audited and certified for the contractor the amount due him for the same quarter. The sureties of the contractor have a right to demand that all fines, penalties, or forfeitures against him be deducted before paying anything to the subcontractor. Act May 17, 1878, s.c. 3 (20 Stat., 61); Rev. Stat., 3963; Postal Regulations, 625, 626.

IV. This case is properly appealed. The Second Assistant Postmaster-General having certified the performance of service for the quarter without fines or deductions, the Auditor should have allowed the contractor the full sum of \$7,995 for the third quarter of 1881, and, upon failure of the subcontractor to give 90 days' notice, the Auditor should have certified to the contractor the full amount due him. The appeal opens the whole case.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Several questions are presented for decision, which will be separately considered.

I. The First Comptroller has jurisdiction by statute of the appeal taken. The Revised Statutes provide:

"SEC. 270. Whenever the Postmaster-General or any person whose accounts have been settled by the Sixth Auditor is dissatisfied with the settlement made by the Auditor, he may, within twelve months, appeal to the First Comptroller, whose decision shall be conclusive."

It is urged that this gives a right of appeal only to the Postmaster-General and "any person whose accounts have been settled," and that no account of the appellant Dorsey has been settled. It may be true, in literal strictness, that the account settled is not that of Dorsey the original contractor, but it is such an account as that he may appeal from its settlement by the Auditor. The statute provides that:

"The Sixth Auditor shall receive all accounts arising in the Post-Office Department, or relative thereto, with the vouchers necessary to a correct adjustment thereof, and shall audit and settle the same, and certify the balances thereon to the Postmaster-General. He shall close the account of the Department quarterly, and transmit to the Secretary of the Treasury quarterly statements of its receipts and expenditures." (Rev. Stat., 277.)

When, as in this case, the subcontractor is entitled to receive a sum less than the original contract price for the service performed, the balance of the contract price is to be settled in an account in favor of, and

paid to the original contractor. (Act May 17, 1878, 20 Stat., 62, sec. 3.) The original contractor is thus directly and immediately interested in the settlement of the accounts of the subcontractor, and such settlement becomes an element in, and, in effect, a part of, the settlement of the account of the contractor. A case may be within the purpose of a statute which is not within its letter, or it may be within its letter though not within its purpose, yet, in either event, the purpose must prevail. (Potter's Dwaris, Stat., 180.) A construction which would deny to the contractor the right to appeal would adhere to the mere letter against the purpose of the statute, and invoke the censure of the maxim—*qui hæret in litera, hæret in cortice*. The statute giving an appeal is remedial and to be liberally construed to secure its object. (Potter's Dwaris, 73, 231. Martin's case, 2 Lawrence, Comptroller's Decisions, 330.) This case is appealable.

II. Section 3737 of the Revised Statutes *prohibits* and makes *void* the assignment, "transfer," of any public contract; and when such contract is transferred, it is, by force of the statute, *annulled*. Section 3963 *expressly* provides that, in respect of mail contracts, their assignment or transfer shall be null and void. (See Contract Assignment case, 2 Lawrence, Compt. Dec., 473.) "Postal Laws and Regulations," promulgated as regulations of the Post-Office Department, 1879, page 146, section 623, contains the prohibition against *assignments* or *transfers* of mail contracts. Evidently, under these laws, and section 623 of the regulations, there was no authority to transfer, assign, or sublet a mail contract.

But the act of May 17, 1878, section 3 (20 Stats., 61), incorporated into said regulations (page 146, section 624), says: "Hereafter no subletting or transfer of any mail contracts shall be permitted without the consent in writing of the Postmaster-General."

On principles of public policy (10 Op. Att. Gen., 4) and by express prohibition of the law, as contained in the two sections of the Revised Statutes cited, there was *no power* to transfer or sublet, or assign in any manner, a public contract for carrying the mails; and yet, since May 17, 1878, with but few and unimportant exceptions, the whole "star route" mail service has been sublet by the contractors for that service to other parties for performance, with the "consent in writing of the Postmaster-General." The act of May 17, 1878, does not *in terms* grant any power to the Postmaster-General to consent to such transfers or sublettings of mail contracts; the prior law in the most express, positive, and unqualified language clearly denied to that officer and to any mail contractor the *power* to assign or transfer such contracts; nevertheless, since Congress, in enacting the act of 1878, used language from which there may be implied a grant of authority to the Postmaster-General to *consent* to such transfers or sublettings, this, under a well-known rule of construction, is equivalent to a *grant of power* to the mail contractors to sublet their contracts, with the written consent of the

Postmaster-General; and hence, to this extent, the act of 1878 is a repeal of the previous prohibitions against assignments and transfer of mail contracts. On this construction hangs the validity of almost every "star route" mail contract now existing.

The act of May 17, 1878 section 3 (20 Stat., 61), authorizes subcontracts, with the written consent of the Postmaster-General. When such contracts are lawfully made, copies thereof are to be filed in the office of the Second Assistant Postmaster-General, and notice of the filing is required to be given to the Auditor.

"Said notice shall embrace the name or names of the original contractor or contractors, the number of the route or routes, the name or names of the subcontractor or subcontractors, and the amount agreed to be paid to the subcontractor or subcontractors. And upon the receipt of said notice by the Auditor * * * it shall be his duty to retain, out of the amount due the original contractor or contractors, the amount stated in said notice as agreed to be paid to the subcontractor or subcontractors, and shall pay said amount, upon the certificate of the Second Assistant Postmaster-General, to the subcontractor or subcontractors, under the same rules and regulations now governing the payments made to original contractors." (*Ib.*)

III. That clause of the subcontract which assumes to invest the Auditor with authority, and to make it his duty to retain the pay of the subcontractor for the use and benefit of the contractor in case of a failure of the subcontractor to give ninety days' notice of his intention to cease carrying service, is void.

1. This is the effect of the statute. The act of May 17, 1878, after authorizing subcontracts, with copy filed in the office of the Second Assistant Postmaster General, requires this officer to give notice to the Auditor. It specifies what it shall contain—among other things, as shown by the provision quoted, "the amount agreed to be paid to the subcontractor." The Auditor is then required "to retain out of the amount due the original contractor the amount stated in said notice as agreed to be paid to the subcontractor." The statute thus fixes the agreed price as the sum to be retained. In thus affirmatively fixing the sum and prescribing the duty to retain it for the subcontractor, the statute, by implication, declares that no part of the moneys earned by the subcontractor shall be withheld from him for the benefit of the contractor. *Expressio unius est exclusio alterius*. The same result follows from another principle.

2. A subcontract cannot impose a duty on an officer outside of and beyond that prescribed by the statute. The subcontract in this case assumes to require the Auditor to ascertain the fact whether the subcontractor has given a notice, not to the government, but to the contractor, and charges the Auditor with a duty to adjudge a forfeiture. The duties of the Auditor are prescribed by the statute, and his time is charged by law with the performance of official duties. Private parties cannot add to his official duties, nor require the performance of acts

which are not only unauthorized by, but, as in this case, in opposition to what is required by statute. The statute says the subcontract price shall "be paid to the subcontractor." The subcontract attempts to engraft an exception to the statute. The statute, evidently, contemplates a price to be fixed by the subcontract, to be paid on the performance of service. It does not contemplate payment subject to be defeated by any contingent forfeiture to which the subcontractor may improvidently agree to submit. The statute does not say so. It would require clear language to impose so dangerous a power on the Auditor, and one so difficult of performance.

The subcontractor for mail service is, at least, as much in the service of the government as the original contractor. His right to compensation for service performed can be defeated only by statutory provisions. His compensation is as much protected from the demands of private creditors as that of any other person or officer in the service of the government. It is immaterial whether the penalty stipulation in the contract is or is not a valid agreement; because the subcontractor has, by statute, a right to the amount certified to be due to him for the service which he performed. The executive branch of the government has no jurisdiction to determine the amount to be paid under that stipulation. It is a matter for judicial determination. The forfeiture of rights and property cannot, as between private parties, be adjudged without a judicial hearing after due notice to the parties. (*Griffin v. Mixon*, 38 Miss., 434.) It is said that a party cannot, even by his own misconduct, so forfeit a right that it may be taken from him without judicial proceedings in which the forfeiture shall be declared in due form (*Cooley's Const. Lim.*, 362).

The Auditor has no jurisdiction in such a case; and the consent of the parties to the contract could not confer it upon him.

It is not claimed that the amount found due to the subcontractor is forfeited to the government for any failure or neglect on his part. Besides this, it is conclusively shown by the certificate of the Second Assistant Postmaster-General of October 27, 1881, that the subcontractor earned this amount without any failure or delinquency. In such case the statute expressly provides that the payment shall be made to the subcontractor "under the same rules and regulations now governing the payments made to original contractors." This gives to the subcontractor the same right to the stipulated compensation for the services rendered by him, that the contractor would have had, if instead of subletting the contract he had performed it himself.

It has been said in *Ames v. Port Huron Log-driving and Booming Company* (11 Mich., 147): "It is absurd to suppose that any official power can exist in any person by his own assumption, or by the employment of some other private person; and still more so to recognize in such an assumption a power of depriving individuals of their property."

It was also said in the same case, that where a debt, or penalty, or

forfeiture is set up by one person against another the determination of the liability therefor becomes a judicial function; that "all judicial functions are required by the Constitution to be exercised by courts of justice or judicial officers regularly chosen;" and that the party liable "can only be reached through the forms of law upon a regular hearing, unless he has by contract referred the matter to another mode of determination." The latter mode can only be by arbitration.

3. The statute has authorized the Postmaster-General to make deductions from the pay of contractors for failures to perform service according to contract, and to impose fines upon them for other delinquencies. (Rev. Stat., 3962; act March 3, 1879, sec. 5, 20 Stat., 358; Postal Laws and Regulations, ed. 1879, secs. 666-669.) This exercise of authority is necessary in order to enforce the execution of contracts and protect public interests. Whatever may be the character of this power, whether executive or judicial, it has the sanction of a statute and the assent of the parties to contracts. Subject as it is to judicial control it may be sustained without an infraction of the Constitution. (*Reckner v. Warner*, 22 Ohio Stat., 275.)

But the authority sought to be given by the subcontract in this case is without any sanction by statute. It seeks to prescribe a duty to forfeit rights of private parties *inter sese*, in which forfeiture the government has no concern; and it seeks to do this by no fixed rule of accounting, but by contingencies designed to divest rights without "due process of law." It may well be questioned whether such authority could be constitutionally sanctioned by Congress. (Cooley, Const. Lim., 4th ed., [352] 437-460.) The subcontract gives a right to compensation, but provides for a total forfeiture thereof on failure to give notice. If such forfeiture could be enforced by the Auditor, it might well be urged that it could not be finally adjudged by him in such a form as to put the money forfeited in a position to be lost to the subcontractor, without a judicial proceeding in court. (Cooley, Const. Lim., [363] 450; *Griffin v. Wilcox*, 21 Ind., 370; *Johnson v. Jones*, 44 Ills., 142.) If the money due a subcontractor may, by an accounting officer, be declared forfeited and so paid to a contractor, the insolvency of the latter might place it beyond the remedy of judicial process. A similar forfeiture to the government could not meet this difficulty, since its ability to meet all demands cannot be questioned in courts.

The subcontract attempts to require the Auditor to declare a right to payment forfeited, to adjudge the money to the original contractor, and make payment accordingly. This is, in effect, to perform the office of a court, by making a decree on a creditor's bill, without the formality of a judgment to precede it. The law gives no such authority to the Auditor. It may be that a subcontract may require an Auditor to ascertain the performance by the subcontractor of all conditions precedent to his right to payment. If a particular notice be an authorized condition precedent, it may be that the Auditor could be required to find

that it was given. But in this case there has been no failure to perform any lawful condition precedent. All such conditions have been performed, and a vested right to payment is thereby created; and the Auditor is asked to declare this forfeited by the failure to perform a condition subsequent. Advantage can only be taken of the failure to perform such a condition as that provided in the contract "by judicial proceedings * * the equivalent of an inquest of office at common law, finding the fact of forfeiture." (*Schulenberg v. Harriman*, 21 Wall., 63.) As between private citizens there can be no exercise of legislative or executive power to declare a forfeiture. Such forfeiture requires "due process of law."

4. There is authority for saying that such uncertain and unliquidated damages as would arise for the breach of the subcontract are not within the jurisdiction of accounting officers. (*Printers' Case*, 2 Lawrence, Compt. Dec. 504.) And if the jurisdiction existed, the duty to enforce it as an entirety is at least open to question, upon well-settled legal principles. (3 Pars. Cont., 6th ed., 156; Sedgwick, Dam. 6 ed., 482, 492, 498 n. 505.)

"The pay that may be due the second party" which the contract declares "forfeited" for "a failure to give notice of any intention to cease carrying the service" is not *liquidated damages*. From its nature it may be more or less than the real damages. The whole subject of liquidated damages has been so fully discussed in elementary works and decided cases that it is not deemed necessary to refer to them in detail. (3 Pars. Cont., 156; Sedgwick, Dam. 6th ed., 498 n. [405]; *Van Buren v. Digges*, 11 How., 462; *Taylor v. Sandiford*, 7 Wheat., 18; *Astley v. Weldon*, 2 Bos. & Pul., 346; *Smith v. Dickinson*, 3 B. & P., 630; *Kemble v. Farren*, 6 Bing., 141; *Horner v. Fleirtoff*, 9 Mees. & Wels., 678.)

The forfeiture in this case seems to have been intended only to secure the performance of the main object of the agreement. In such case courts incline to hold it a penalty. (3 Pars. Cont., 163 n.: *Sloman v. Walter*, 1 Bro. Ch., 418; *Graham v. Bickham*, 4 Dall., 149; *Merrell v. Merrell*, 15 Mass., 488.)

It would be practicable for the Auditor to ascertain by computation the "pay that may be due the second party" [subcontractor] at the time he ceased performing service; but the Auditor could not, as the subcontract requires, "retain such pay for the benefit and use of the first party" [Dorsey], because the law does not give him a right to it. The subcontract attempts to secure as damages a sum which the law does not give or permit to be allowed as damages. The "pay that may be due" might be for one or more quarters, or only for a portion of a quarter's service. The subcontractor ceased to perform service October 7. He might have been paid October 1, in which event only seven days' pay would be due. He might not have been paid for six months, and so a larger sum would have been due. The amount is so wholly uncertain that it cannot be regarded as liquidated damages.

If a fine had been imposed on Dorsey for failure to perform service after October 1, that sum could have been ascertained by the Auditor, but this would not be the sum he was required by the subcontract to retain, nor would it be necessarily the measure of damages to which Dorsey would be entitled. The damages he would sustain by the failure of the subcontractor to give notice as required might be much or nothing. The law fixes the general damages as the difference between the subcontract price and the real cost of the service. (Sedgwick, Dam., 426 [356]; O'Conner v. Forster, 10 Watts, Pa., 418; Ogden v. Marshall, 4 Seld. 340; Grund v. Pendergast, 58 Barb., N. Y., 216.)

In no event could the Auditor lawfully retain the sum mentioned in the subcontract.

IV. It is urged that if the clause in question of the subcontract is void, the whole subcontract is void, and the subcontractor would have no remedy but to go to the courts on a *quantum meruit*.

1. If it be assumed that the whole subcontract is void, then Dorsey did not, through his subcontractor or otherwise, perform any service, and he is entitled to no compensation. If he has made a void contract, he has no concern with the mode in which the government may settle with, or the amount which it may pay to, Taylor.

2. But the void clause of the subcontract is severable from the residue. The other provisions of the contract are not, in any material sense, dependent on it, and that part of the contract which is valid may be enforced. (Gelpcke v. Dubuque, 1 Wall., 221; Treadwell v. Davis, 34 Cal., 601; Hynds v. Hays, 25 Ind., 31; Frazier v. Thompson, 2 Watts & S. 235; Rich v. Dupree, 14 Ga., 661; Scott v. Duffy, 14 Pa. St., 18.)

V. It is urged that the sureties of the contractor have a right to demand the forfeiture in order to indemnify them against any liability heretofore incurred against Dorsey, and claims for damages which may arise.

1. The sureties can no more insist on the execution of illegal claims of a contract than the principal. Their liability is measured by his. It does not appear that there is any existing liability of Dorsey, or his sureties, on the contract. The protection of the government, and the sureties, against such liability is found in the statute providing that subcontracts can only be made with the written consent of the Postmaster-General; and it is not to be presumed that such assent would be given if the contractor should be indebted to the government, or liable for damages, at least not in a form which would enable him to take from the government the means of indemnity. But, if so, the statute requires payment to the subcontractor, who has properly performed service, of the sum due by the terms of the subcontract. The original contract is made in view of the statute, and subject to the authority it gives to the Postmaster-General. If the interest of the government justifies the Postmaster-General in permitting a subcontract to be made, while the original contractor and his sureties are liable in damages, which may, possibly, sometimes happen, the sureties must, nevertheless, continue liable. ●

The Postmaster-General is not bound to sacrifice the public interest, or embarrass the mail service, to save the sureties from liability. *Salus populi suprema lex.* The same rules do not always apply to the government which apply as between private citizens. A contractor, already liable in damages to the government for failure to properly perform service, might give such evidence of inability to continue to transport mails as to render it desirable for the Postmaster-General to approve a subcontract, which, when approved, would give the subcontractor the whole original contract price, if no better terms could be procured. In justice to the vast commercial and other interests involved in the prompt delivery of mails, the Postmaster-General could not, in such case, hesitate to assent to a subcontract. The law gives the sureties of the original contractor no immunity from past or prospective liability in such case. Such immunity would contravene public policy, not only in operating as an inducement to the Postmaster-General to withhold his assent to a needed subcontract, but in depriving the government of indemnity by a remedy against the sureties. It would hold out an inducement to a contractor with an unprofitable contract to compel assent to a subcontract for the purpose of relieving his sureties, when, if he could not thus relieve them, he would have an incentive to perform the service, save his sureties, and avoid the necessity of a subcontract.

2. It is a general rule, applicable to private parties, that a surety will be discharged, at least to a certain extent, if the creditor release assets received from the principal debtor resulting in loss caused by the fault of the creditor. (Brandt on Suretyship, 370-383; DeColyar on Guaranties and Principal and Surety, 440.)

The principle on which the surety thus becomes released is that a loss has been "caused by the fault of the creditor." But the performance of an official duty required by considerations of public interest cannot be regarded as a fault; and, hence, the principle stated does not apply here. It may be said that "when the surety assumed his obligation he knew the remedies provided by law for the public interests might be enforced" for the benefit of the public service; and that that which is lawful cannot be treated as fault. (Perry v. Saunders, 36 Iowa, 427.)

VI. The Sixth Auditor had full authority to determine the amounts due from the government under the contracts to the contractor and subcontractor.

The Sixth Auditor is not only an auditor, but a comptroller also. His power to audit and settle accounts and certify balances generally carries with it the right to review amounts certified to him by officers of the Post-Office Department; otherwise, the Auditor would be reduced, as to such sums, to the performance of a mere ministerial duty. The power to audit and settle claims and certify balances carries with it the authority to ascertain the validity and extent of the demands to be certified. To audit is to hear; to settle is to decide. The power to decide by necessary implication carries the authority to require and pass on all

requisite evidence. It must be "always construed to include all the necessary and usual means of executing it with effect." (Story, Agency, sec. 58.) The power to certify a balance due, *certum facit*, for a like reason includes the authority to review and decide all questions of law and fact, and to use all sources of information. When Congress has intended the allowance or statement of a claim to be conclusive on an accounting officer, explicit language has been deemed necessary. (Rev. Stat., 48, 191.) This is necessary, since such cases reverse the whole auditing policy of the government. A settlement of an account and a certification of a balance which cannot go to the sources of evidence, and examine all questions of law and fact, would practically be no examination; it would be the play of Hamlet with Hamlet omitted.

But it is not necessary to determine the extent of the powers of the Auditor* or decide other questions presented in argument.

The action of the Auditor is correct, and is approved and confirmed.

TREASURY DEPARTMENT,

First Comptroller's Office, January 3, 1882.

IN THE MATTER OF COLLECTING UNDER POWERS OF ATTORNEY TO RECEIVE PAYMENT SALARIES OF OFFICERS AND OTHER CLAIMS AGAINST THE UNITED STATES.—CLAIMS-ASSIGNMENT CASE.

1. The word "claim" in the statute (Rev. Stats., 3477) which makes void "all transfers and assignments * * * of any claim upon the United States, * * * unless after the issuing of a warrant for the payment thereof," includes salaries and other liquidated demands, as well as unliquidated demands, and all claims of every description except: (1) the salaries of ministers, consuls, and commercial agents representing the United States abroad; (2) those included in assignments by operation of law; (3) those included in voluntary assignments for the benefit of creditors; (4) those included in assignments under the act of June 30, 1864 (13 Stats., 310; Rev. Stats., 1526), and the act of May 8, 1792 (1 Stats., 280, Rev. Stats., 1291); (5) those included in assignments under the operation of special statutes, as that of June 16, 1880 (21 Stats., 287, sec. 2); (6) salaries and pay actually due to Army officers; (7) as to assignments of judgments against the United States, quære? (8) as to assignments whether recognized in the Court of claims, quære? and (9) ordinary claims against the District of Columbia.
2. The statute makes void all powers of attorney, and other authorities for receiving payment of any claim, unless executed after the issuing of a warrant for the payment thereof, except in the several excepted classes of cases above specified.
3. Some of the reasons which require the word "claim" to be construed in the comprehensive sense of including liquidated demands are: (1) the weight of decided cases so requires; (2) the reasons upon which the cases rest so require; (3) this is the sense in which it is generally used in other statutes; (4) this is its general meaning; it is the most comprehensive term which can be used to include every demand; (5) the word is general and comprehensive in its meaning, and by a rule of interpretation is to be applied in a general and comprehensive sense,

* This subject is elaborately discussed in an able decision of Hon. Hiland Hall, Second Comptroller, February 10, 1851. See 1 Lawrence, Comptroller's Decisions, Appendix, p. 509.

- unless limited by the context or evident purpose of Congress; and it is not so limited; (6) if Congress had intended to permit the assignment of salaries and liquidated demands, it is reasonable to suppose the mode and evidence of assignment would have been prescribed, as in the case of government bonds; (7) this construction is justified by the title of the act from which the provision is taken, and the penal provisions affecting claims.
4. *Semble*, that payments made by the government under powers of attorney purporting to authorize them, but executed in contravention of the statute, will estop claimants making such powers from any further demand upon the United States.
 5. Powers of attorney are not valid to authorize agents to receipt pay-rolls, or other vouchers of disbursing officers.
 6. Exceptions in statutes are not generally to be enlarged by inference.
 7. On common-law principles, an assignment by a public officer of the future salary of his office is contrary to public policy and void.
 8. Corporations are subject to the operation of section 3477 of the Revised Statutes. A corporation therefore cannot execute a power of attorney "for receiving payment of any claim" which is to be paid by a treasury warrant, except after the issuing of the warrant. But the proper financial officer of a corporation, whose authority is subsisting, and without reference to the time of his appointment, may receive payment of a warrant or indorse and collect a draft issued to make payment thereof.
 9. So the proper *financial officer* of a corporation, without reference to the time of his appointment, may receive and indorse checks of disbursing officers given to make payment of claims not to be paid by warrant. If the charter of a corporation authorizes the appointment of more than one financial officer with authority to each to indorse checks and drafts and receive payment of claims, the authority of each one so appointed will be recognized.
 10. The financial officer is, in legal contemplation, the corporation *quoad* the acts he is authorized to perform. The evidence of his authority is not a power of attorney, but a duly certified copy of his appointment, showing his official character and authority. He sustains an *official* relation to the corporation, and in this respect differs from an agent acting under a power of attorney who can not lawfully receive payment of a claim from a disbursing officer.

The following questions have been submitted to the First Comptroller for his opinion:

I. Can a valid power of attorney be executed to receive payment of a claim against the United States prior to "the issuing of a warrant for the payment thereof"?

II. Can an officer, prior to "the issuing of a warrant for the payment" of his salary, execute a valid power of attorney to receive payment, or indorse a draft issued in payment of such salary?

III. Where a salary or claim for money due from the United States is payable from moneys advanced to a disbursing officer for the liquidation of such salary or claim, can a valid power of attorney be executed to receive payment thereof, or to indorse a check issued by the disbursing officer for its payment?

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes contain these provisions:

"SEC. 3477. All transfers and assignments made of any claim upon the United States or of any part or share thereof, or interest therein,

whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for *receiving payment of any such claim, or of any part or share thereof*, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same." (See Revised Statutes, section 1778.)

"SEC. 3737. No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties are reserved to the United States." See act July 17, 1862, section 14 (12 Stats., 596).

"SEC. 1576. Every assignment of wages due to persons enlisted in the naval service, and all powers of attorney or other authority to draw, receipt for, or transfer the same shall be void, unless attested by the commanding officer and paymaster. The assignment of wages must specify the precise time when they commence." (See Rev. Stat., 1082.)

"SEC. 1291. No assignment of pay by a non-commissioned officer or private, previous to his discharge, shall be valid."

The act of May 17, 1878, section 2 (20 Stats., 62), authorizes a contractor for carrying the mails to sublet or transfer his contract with the "consent in writing of the Postmaster-General."

The assignment of certain contracts with Indians with "the consent of the Secretary of the Interior and the Commissioner of Indian Affairs" is permitted and regulated by the Revised Statutes. (Sections 2103, 2106.)

The act of June 16, 1880 (21 Stat., 287, sec. 2) recognizes certain transfers of the right to a refund of excess purchase money on the sale of double-minimum lands. (Allspach's case, 2 Lawrence, Compt. Dec., 258.)

For sundry cases as to the assignment of claims, see Safford's case, 1 Lawrence, Comptroller's Decisions, 285; *United States v. Gillis*, 95 U. S., 407; *Erwin v. United States*, 97 U. S., 392; *Spofford v. Kirk*, 97 U. S., 484; *McKnight v. United States*, 98 U. S., 179; *Goodman v. Niblack*, 102 U. S., 559; *Neuchatel Co. case*, 16 Court Cl., 597; *Buffalo Bayou R. R. case*, 16 Court Cl., 238; *The Floyd Acceptances*, 7 Wall., 666; *Trist v. Child*, 21 Wall., 441; *Benton's case*, 2 Lawrence, Compt. Dec., 455.

See Revised Statutes, 1430, 2106, 2436, 4535, 4643, 4845; 9 Op., 188; 16 Op., 263.

The statute in relation to the assignment of claims against the United States makes two declarations:

1. It declares void all assignments, unless made "after the allowance

of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

2. It declares void "all powers of attorney, orders, or other authorities for receiving payment of any such claim," unless after such allowance, ascertainment of amount, and issuing of a warrant. The questions presented are to be considered with reference to this language, the purpose of the section, and other statutory provisions, and also with reference to common-law principles.

I. As to claims which are unliquidated and remain to be ascertained by accounting officers, it is entirely clear that all transfers and assignments thereof, unless made after the issuing of a warrant for the payment thereof, are declared to be void. It is equally certain that "all powers of attorney, orders, or other authorities for receiving payment of any such claim" are void, unless made after the issuing of a warrant for the payment thereof. This is the necessary effect of the language of the statute. These principles apply to claims which are to be examined by auditing officers (Rev. Stat., 236, 277, 269, 313, 248, 305) on which balances are to be certified by a comptroller (Rev. Stat., 191, 269), for the payment of which a warrant is to be issued by the Secretary of the Treasury and countersigned by the First Comptroller (Rev. Stat., 248), and when the payment is to be made by the Treasurer, either in money duly receipted for on the warrant or by his draft (Rev. Stat., 305, 3593, 3644.) The mode of proceeding on such claims, in order to secure payment, has been stated with clearness and ability by Judge Richardson, in McKnight's case, 13 Court Cl., 299. See, also, 15 Op. Att. Gen., 139. The Supreme Court has, in explicit language, shown, in several cases, that unliquidated claims cannot be assigned. The prohibition against powers of attorney is general, and by no means limited to those made for the purpose of effecting or aiding an assignment of unliquidated claims.

II. If the expression in the statute, "any claims," was intended to include a salary, the same rules are also applicable to other liquidated demands, and, of course, to those not liquidated.

1. There is high authority for so holding. The Supreme Court, in construing section 3477 of the Revised Statutes, has said that its "words embrace every claim against the United States, however arising, of whatever nature it may be, and wherever and whenever presented." (United States v. Gillis, 95 U. S., 413. See also 5 Op. 85.) This language is repeated and reaffirmed in Spofford v. Kirk, 97 U. S., 489; and the court apply the language to "a transfer of a debt." A debt is a liquidated demand. The Supreme Court, therefore, seem to hold that the expression "any claim" includes liquidated demands, and salaries are generally such demands. The court fortify this view by giving some of the reasons for the enactment of the statute:

"We can only infer from its provisions what the frauds and mischiefs had been, or were apprehended, which led to its enactment.

“(1.) One, probably, was the possible presentation of a single claim by more than a single claimant, the original and his assignee, thus raising the danger of paying the claim twice, or rendering necessary the investigation of the validity of an alleged assignment.

“(2.) Another and greater danger was the possible combination of interests and influences in the prosecution of claims which might have no real foundation. * * * Within our knowledge there have been claims against the government, interests in which have been assigned to numerous persons, and thus an influence in support of the claims has been brought into being, which would not have existed had assignments been impossible.”

“(3.) Another purpose may have been to save claimants from unreasonable discounts by purchasers.*

“(4.) As the death of a claimant operates as a revocation of naked powers, the government might frequently be involved in double liability by paying an agent, when payment should only be made to an executor or administrator. If powers of attorney are valid, before the issuing of a warrant, long periods of time may elapse after execution before payment under them.”

2. Some of these *reasons* apply as well to salaries as to unliquidated claims, especially that in respect of the difficulty of ascertaining the validity of assignments, and hence the danger of being required to pay more than once.

With all the precautions and safeguards thrown around the assignment of government bonds, frequent contests have arisen over the

* The attention of Secretary Folger was recently called to the fact that many clerks in the department borrow money from brokers at from five to ten per cent. interest per month. They give to the broker an order for their pay to the amount borrowed, with the interest charged. Brokers will not take a promissory note for the loans, but require an order for their pay from the borrowers, or, more generally, a post-dated receipt, as for payment by a disbursing officer. Disbursing clerks recognize these orders, and the clerks cannot draw their money themselves. It goes to the broker who holds their pay order. During the last three months a clerk in the Treasury Department has paid \$33 interest on the \$100 borrowed. The disbursing clerk of his bureau holds his pay order, and will not give him his salary except by the creditor's consent, and so he is compelled to pay about \$11 per month blood money in order to be able to draw his salary for the support of himself and family. On the papers giving in detail, with the name of the clerk, the circumstances just mentioned, Secretary Folger put the following indorsement: “It is contrary to public policy to uphold the prospective assignment by an employé of the government of his accruing salary, and I disapprove of the practice stated in the within papers to exist. I direct that an order be addressed to disbursing clerks forbidding them to receive, hold, and act upon assignment by clerks of salary yet to accrue.”

In *Goodman v. Niblack* (102 U. S., 560) the court said of section 3477 of the Revised Statutes: “Its *sole* purpose was to protect the government, and not the parties to the assignment.”

In 9 Opinions, 188, Attorney-General Black shows in vigorous and forcible language the purpose of the statute, and *inter alia* says: “In some instances transfers and powers of attorney were given by parties in utter ignorance of their rights. The fraud upon them was also a fraud upon the Treasury, for the money in such cases was paid to parties not justly entitled to it.”

validity of assignments, and the Treasury has, in fact, been compelled sometimes to pay the same bond twice. (Putnam's case, 1 Lawrence, Comptroller's Decisions, 208; Klink's case, *Id.*, 242; 5 Op. 85.)

On grounds of public policy, and for the convenience of accounting officers, assignments of claims should not be recognized.

At common law an ordinary claim is not negotiable nor indeed assignable. Thus, in *United States v. Robeson*, 9 Peters, 241 [325], it is said:

"There is no law of Congress which authorizes the assignment of claims on the United States; and it is presumed that if such assignment is sanctioned by the Treasury Department, it is only viewed as an authority to receive the money, and not as vesting in the assignee a legal right." (1 Parson's Cont., 6 ed., 223; *Cowdrey v. Vandenburg*, 101 U. S., 572; *Police Jury v. Britton*, 15 Wall., 566; *Neufchatel Co. case*, 16 Court Cl., 598; Coke, Litt., 214 a; Daniel on Negotiable Instruments, sec. 1.)

At most, such assignment could only pass an equitable interest, and it would be extremely difficult for accounting officers to exercise the equity jurisdiction necessary to determine the rights between assignors and assignees.

It will be admitted as a well-known canon of public policy that no person can, without the express or implied assent of the government, establish between himself and it the relation of debtor and creditor; and another well-known canon is, that when a contract is entered into between the government and a person the contractor cannot escape liability under his contract by assigning it to a third party, for the government is not bound to accept the service of such third party. With these canons as our guides, there can be no difficulty in respect of any case of assignment of claims. The accounting officers will say to the assignee:

You assert that you are a creditor of the government, because of an assignment to you of a demand against it. It is a canon of public policy that no man can by such means become a creditor of the government. Congress alone can make an exception to this canon. Has Congress done so, and, if so, where is the statute; or where the recognition by Congress of a practice in the executive departments which may be regarded in this case as a waiver of the canon?

In the *Floyd Acceptances*, 7 Wallace, 681, the Supreme Court said, "As there can be no lawful occasion for any department of the government, or for any of its officers or agents, to accept drafts drawn on them under any statute or other law now known to us, such acceptances cannot bind the government." It is said, however, that "when an officer or agent of the government at a distance is entitled to money here, the person holding the fund may pay his drafts." This does not relate to money due for *salaries*. The statute against assignments was not under consideration. When a disbursing officer or agent at a distance, having money to his credit with the Treasurer or an assistant treasurer (Rev. Stats., 3620), requires funds, an advance of money may be made on his draft. (Rev. Stat., 300, 306, 1563, 3646, 3647, 3648, 4055. See act June

23, 1874, 18 Stat., 216; act February 27, 1877, 19 Stat., 249; 15 Op., 288, 303.)

3. The word "claim" in section 3477 was designed to apply to every money demand. It is taken from the act of February 26, 1853 (10 Stat., 171), which declares (sec. 7) that "the provisions of this act shall apply and extend to *all claims* against the United States, whether allowed by special acts of Congress or arising under general laws or treaties, or in any other manner whatever." Broader language could not be used. A "special act of Congress" which specifically directs the payment of a *fixed sum* to a *person named* creates a definite right as certain in amount as any *salary* can be, yet such claim is not assignable. (5 Op. 85.) A salary may be dependent on the construction of a statute for its *amount*, its *time of payment*, and the *right to receive it*. (Rev. Stat., 1763, 1764, 1765; Graham's case, 1 Court Cls., 380; Smith's case, 2 *Id.*, 206; Mahoney's case, 3 *Id.*, 152; Reynolds' case, *Id.*, 197; Allstaedt's case, *Id.*, 284; Moore's case, 4 *Id.*, 139; Otterbourg's case, 5 *Id.*, 430; Barger's case, 6 *Id.*, 35; Patton's case, 7 *Id.*, 362; Ware's case, *Id.*, 565; Sleigh's case, 9 *Id.*, 369; Reinhard's case, 10 *Id.*, 282; Benjamin's case, *Id.*, 474; United States v. Morse, 3 Story, 87; Mahoney's case, 10 Wall., 62; Stansbury's case, 8 Wall., 33.) Numerous other cases might be cited. They show that in many cases the assignment of a salary is open to the objection that thereby an "influence" could thus be brought in support of it "which would not have existed had assignment been impossible." (Spofford v. Kirk, 97 U. S., 490.)

Again, the act of February 26, 1853 (10 Stat., 170; Rev. Stat., 5498), makes it a penal offense for an officer of the United States to act as agent or attorney for prosecuting "any claim against the United States * * *". It can scarcely be supposed that the prosecution by an officer, as attorney or agent for another officer, of a claim for a salary is not within this act. (See act July 29, 1846, 9 Stat., 41.) And it may be observed that section 3477 of the Revised Statutes was compiled from section 1 of the act of February 26, 1853, and that the latter act was an enlargement of the prohibitions of the act of July 29, 1846. The latter act referred only to claims allowed by Congress, the former to "any claim upon the United States," hence it covered *all* such claims.

4. The word "claim," *ex vi termini*, includes a demand for the salary of an officer and all liquidated demands as well as others not liquidated. It is the most comprehensive word which can be used to include every possible demand for money. It is *generic* in character, embracing, as species, unliquidated demands, wages, pay, compensation, salaries, *et id omne genus*.

Webster thus defines the word "claim":

(1.) A demand of a right or supposed right; a calling on another for something due or supposed to be due.

"Doth he lay claim to thine inheritance?"—*Shak.*

[“Nothing in this Constitution shall be so construed as to prejudice any *claims* of the United States, or of any particular State” to land. Const., art. 4, sec. 3, cl. 2.]

(2.) A right to claim or demand; a title to any debt, privilege, or other thing in possession of another.

“A bar to all claims upon land.”—Hallam.

“No person held to service or labour in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labour, but shall be delivered up on *claim* of the party to whom such service or labour may be due.” (Const., art. 4, sec. 2, cl. 3.) The Supreme Court said of this word in this clause, “a *claim*, in a just juridical sense, is a demand of some matter as of right made by one person upon another to do or to forbear to do some act or thing as a matter of duty.” (Prigg v. Pennsylvania, 16 Pet., 541.) A claim is a challenge by a man of the property or ownership of a thing which he has not in possession, but which is wrongfully detained from him. (Stowell v. Zouch, Plowden, 359; Cummings v. Lynn, 1 Dall., Pa., 444; Willing v. Peters, 12 Serg. & Rawle, 179.)

(3.) The thing claimed or demanded; that to which any one has a right; as, a settler's claim. [United States and Australia.]

Here it is shown that the word *claim* covers every demand, of every conceivable character, for money or property. But Webster has not expressed the whole broad meaning of the word. It applies to the assertion by a party of a (1) legal or (2) moral principle, or (3) allegation of fact. Many examples might be given of this use of the word:

Waite, Ch. J.: “Lien under which the complainant *claims*.” (Wilson v. Gaines, 103 U. S., 421.)

Woods, J.: “The plaintiff * * * *claims* that the plan * * * was against the law and public policy.” (Spring Co. v. Knowlton, 103 U. S., 56.)

Bradley, J.: “It was *claimed* * * * that the boundary had never been located.” (Land Co. v. Saunders, 103 U. S., 320. See Ward v. Todd, 103 U. S., 330, Waite Ch. J.)

Richardson, in his dictionary, says of the word “claim”: “Our present usage, Skinner thinks, is, with a slightly varied signification, from the Latin *clamare*, i. e., to demand a right by calling loudly for it.” And examples are cited to show that it applies to a demand for *heritages* (R. Brunne, 49; Gower, Con. A., b. ii); for political power as a claim to the crown (Sir T. More's Works, 36); for distinction, as:

“None sure will claim in hell precedence.”—(Milton's Paradise Lost, b. ii.)

For personal property; for protection from danger; for authority, as: “The pretensions of contending parties laid before the Pope” for confirmation; and other examples running back to early stages in the formation of our present composite language, showing that it has been, and is, the most comprehensive word that can be used in the assertion of demands of all kinds.

Attorney-General Black, referring to this provision, said :

“It would be difficult to conceive how this section could have been made more comprehensive. It includes all transfers and assignments of any claim upon the United States or any part thereof, and ‘all powers of attorney, orders, or other authorities for receiving payment of any such claim or any part or share thereof.’ In the elementary books there is said to be an exception to the rule requiring a strict construction of penal statutes in favor of statutes against frauds. These latter are always liberally and beneficially expounded. The fullest effect is given to their provisions intended to suppress the mischief. But it hardly requires the authority of this principle to compel us to admit that the word ‘all’ in the statute means *all*, and does not mean *some*. * * * The former act was confined to claims specifically allowed by a resolution or act of Congress. * * * The act of 1853 applies to all claims whatever.” (9 Op., 190 and 192.)

Again it has been said : “It is difficult to conceive that language more general could be used in reference to claims against the United States, and its obvious intent is to enable the United States to deal solely with the persons with whom it contracts * * *.” (16 Op., 262.)

The suggestion that the words “any claim” mean only *some* claims, finds no rational support in any true interpretation of the words. By what rule will it be said they shall only include disputed claims, or *unliquidated claims*? By what authority are the qualifying adjectives—*disputed*, *unliquidated*—prefixed? If Congress intended such qualification to exist, why were not the proper words to indicate it inserted in the statute? Many unliquidated claims are undisputed, and many disputed claims are liquidated. If we begin to make limitations or qualifications, we are without any fixed rule—we are adrift without compass or rudder.

This investigation of the use of the word claim is only important as showing that it is the most comprehensive one that could be used, and is not limited to a *portion* or class only of money demands. In legislative, executive, and judicial administration the word claim has generally been used in its comprehensive sense. Under a resolution of the House of Representatives of April 11, 1836, a volume was compiled and printed in 1838, with the comprehensive label, “*Revolutionary Claims*.” It shows that the “Committee on Revolutionary Claims” uniformly took cognizance of demands for the payment of *official salaries*, thus regarding them as *claims*. (See American State Papers, Claims.) And in Congress the Committee of *Claims* in either House is the only one having jurisdiction in such cases.

The Court of Claims has jurisdiction of—

“All *claims* founded upon any law of Congress, * * * or upon any contract, expressed or implied, with the Government of the United States.” (Rev. Stat., 1059.)

This has always been held to give the court jurisdiction of actions to recover *salaries* due officers of the United States; and, hence, a salary

is a *claim*. (Graham's case, 1 Court Cl., 380; Moore's case, 4 *Id.*, 141; Patton's case, 7 *Id.*, 371; Clyde's case, 13 Wall., 38; 7 Court Cl., 262; Twenty per cent. cases, 20 Wall. 179; same, 9 Court Cl., 104; Collins' case, 15 Court Cl., 22; Briggs' case, *Id.*, 48; French's case, 16 Court Cl., 419.) A *salary* is a claim which has been said to arise on *contract* (Patton's case, 7 Court Cl., 362), and then again in a special case on statute (Moore's case, 4 Court Cl. 141; Conner v. Mayor of New York, 5 N. Y. (1 Seld.), 85; Phillips v. Mayor of New York, 1 Hi't., 4*3; People v. Burrows, 27 Barb. 89.) The statute authorizing the head of a department to refer "any *claim*" to the Court of Claims undoubtedly includes demands for salaries. (Twenty per cent. cases, 9 Court Cl., 302; S. C. 20 Wall., 179; Lippitt's case, 14 Court Cl. 148.)

The act of May 9, 1866 (14 Stat. 44), gives the Court of Claims jurisdiction of "the *claim* of any * * * disbursing officer * * * for relief from responsibility on account of losses" of funds in certain cases. Here the word claim is used in a broader sense—that of a demand for money. (Clark's case, 11 Court Cl., 702; S. C., 96 U. S., 37; Hobbs' case, 17 Court Cl. See Alire's case, 7 Court C. L., 28.)

The word "*claims*" in the Revised Statutes generally includes "*salaries*." (Sections 190, 1342, art. 60; 1624, art. 14; 1762, 1782, 2032, 2036, 3499, 5438, 5454, 5498.)

The act of June 14, 1878 (20 Stat., sec. 4, p. 130), provides that "It shall be the duty of the several accounting officers of the Treasury to continue to receive, examine, and consider the justice and validity of all *claims* under appropriations the balances of which have been exhausted or carried to the surplus fund." And it requires those allowed to be reported to the Speaker of the House of Representatives for consideration.

The usage has always been to consider *salaries* as included in the "*claims*" mentioned in this act. (See House Ex. Doc. No. 26, first session, Forty-seventh Congress, 2, 4, &c., and prior documents.) The act of March 3, 1875 (18 Stat., 481), provides that—

"When any final judgment recovered against the United States or other *claim* duly allowed by legal authority, shall be presented to the Secretary of the Treasury for payment, and the plaintiff or claimant therein shall be indebted to the United States in any manner, * * * it shall be the duty of the Secretary to withhold payment of an amount * * * equal to the debt thus due to the United States."

Under this statute, as under the act of January 25, 1828 (4 Stat., 246), and the act of May 20, 1836 (5 Stat., 31), carried into section 1766 of the Revised Statutes, *salaries* due officers have always been set off against any *claim* found due from the officer so entitled to salary.

The act of July 17, 1862 (12 Stat., 610; Rev. Stat., 3478), requiring "any person prosecuting claims, either as attorney or on his own account, before any of the departments," to take the oath of allegiance, has uniformly been held to include the prosecution of demands for *salaries*. The joint resolution of March 2, 1867 (14 Stat., 571; Rev. Stat.,

3480), making it “unlawful for any officer to pay any account, *claim*, or demand” which existed prior to April 13, 1861, except in favor of persons opposed to the rebellion, has uniformly been held to include *salaries*.

The jurisdiction of accounting officers is defined by using the expression, “all *claims* and demands.” (Rev. Stat., 236, 1762.)

This broad construction of the word *claim* has been adopted in “claims commissions” under treaties between this and other nations. It was said in *argument*, in *Prigg v. Pennsylvania* (16 Peters, 575), that “*claim* supposes debate, litigation, the decision of a right.” It was at one time held by the First Comptroller that the word *claim* in the statute only included “demands that are disputed or uncertain in their nature.” (1 Lawrence, Comptroller’s Decisions, 294.) But there are objections to this which constitute an additional reason for construing the word in a comprehensive sense.

5. The word is *general* in its definition, comprehending money demands, both certain and uncertain. It is well settled that a *general* word is to be construed in a *general and comprehensive sense*, unless limited by the context, or evident purpose of Congress. *Generalia verba sunt generaliter intelligenda*. (Broom, Leg. Max., 647.) There is no indication of a purpose to limit the general sense of the word. If Congress had so intended the word would have been qualified by some adjective, as “liquidated,” “certain in amount,” &c. The distinction suggested between salaries and other claims is impracticable of execution; salaries are frequently dependent on construction as to the right thereto, the person entitled, and the amount thereof. When the word *claim* is used in a statute and it is not in some way qualified, it has uniformly been interpreted in its largest sense.

6. If Congress had intended that assignment of claims and salaries should be recognized, it is reasonable to suppose that the mode of assigning would have been regulated by law for these, as well as for government bonds. (See “Loan Acts,” and “Regulations” as to bonds, 1 Lawrence, Comptroller’s Decisions, Appendix, ch. xiii.)

In the absence of such provision, assignments might be presented without attestation by witnesses or authentication by official acknowledgment, and successive assignments might be made involving controversies arising from allegations of fraud, failure of consideration, and forgery, and requiring the accounting officers to accept in many cases *ex parte* evidence drawn from an area of country so immense as to render certainty of results doubtful, if not in many cases impossible. (Rev. Stat., 184.) This view seems to be supported also by the statute regulating the issue of duplicate drafts and checks. (Rev. Stat., 300, 306, 307, 308, 3645, 3646, 3647, 4046, 4765.)

7. Section 3477 of the Revised Statutes is taken from the act of July 29, 1846 (9 Stat., 41), entitled “An act in relation to the payment of claims,” and from the act of February 26, 1853 (10 Stat., 170), entitled “An act to prevent frauds upon the Treasury of the United States.”

This latter act contains sundry penal provisions against the prosecution of claims by officers and members of Congress, against the larceny or destruction of papers and records, and against bribery. It precedes these by the provision against assignments and in relation to powers of attorney. It has been suggested that the purpose of this act, as indicated by its title, is "to prevent frauds upon the Treasury," and that as a salary is a fixed sum, neither the assignment thereof nor the execution of a power of attorney can operate as a fraud on the Treasury, and so is not within the prohibition of the statute. This assumes that the *whole purpose* of the act is indicated in its title. It is well settled in England that "where the meaning of the body of the act is doubtful, the title may be relied on as an assistance in arriving at a conclusion," and in this country the rule is that "though the title cannot control the plain intent of the statute, where the words are doubtful it may be resorted to to remove ambiguities." (Sedgwick, Stat. and Const. L., 2d ed., 39; 7 Op., 303.) But in practice the title rarely ever expresses *all the purposes* of a statute; and the *policy* of the enactment now in question may well be considered as affixing to it as among its purposes the protection of the holders of salaries against ruinous discount in the sale thereof, and the convenience of accounting officers in not being required to pass upon the sufficiency of assignments and powers of attorney. If a salary may be assigned in whole, it may be in parts, and if a power of attorney may be executed to collect the whole, there may be sundry powers to collect in parts, thus producing great inconvenience.

If powers may be given they may be revoked, and the validity of revocations and of substituted powers must be considered. All such assignments and powers of attorney *may be used to defraud the Treasury*. The danger of their forgery, the danger arising from payment after the death of the claimant, the difficulty of identifying the parties, and the danger of payment to the wrong person, the danger arising from revocations of powers, and other dangers, all show that such powers and assignments cannot be recognized without thereby entailing frauds upon the Treasury.

It follows by force of the language and purposes of the statute, the reasons stated, and authorities cited, that as to salaries and other liquidated demands, as well as those unliquidated which are to be audited and "allowed," and as to which balances are to be certified by a comptroller in favor of the officer or other claimant, (1) no assignment of such claim can generally be made, and (2) that no valid power of attorney "for receiving payment of any such claim or of any part or share thereof" can be executed until "after the issuing of a warrant for the payment thereof."*

* The statute makes void powers of attorney "for receiving payment of any such claim, or any part or share thereof," unless executed after the "issuing of a [Treasury] warrant (Rev. Stat., 248, 269, 305) for the payment thereof." When a warrant is presented to the Treasurer of the United States he may pay it in money (Rev. Stat.,

To this general rule there may be exceptions :

1. Ministers and consuls abroad are authorized by regulations to collect their salaries by bills of exchange drawn on the Secretary of State or of the Treasury. (Moyer's Case, 1 Lawrence, Comptroller's Decisions, 118; McKnight's Case, 13 Court Cl., 305.)*

305), in which event he is required to "take receipt for all money paid by him * * * indorsed upon the warrant" (Rev. Stat., 305), or he may pay by his *draft* upon the Treasurer, an assistant treasurer or depository (Rev. Stat., 3593, 306, 307, 308). It is clear that the statute makes void powers of attorney *for receiving money* and executing a receipt on the warrant, unless executed after the issuing of the warrant.

The statute seems to make void a power of attorney to *indorse a draft* if such power be executed before the issuing of a warrant, because this is a means "for receiving money" within the statute. But this question is set at rest by the Treasury Department Regulations, which are authorized (Rev. Stat., 161, 305, 311), and require such powers to "state the number, date, and amount of the *draft*," which can be done not after the issuing of the warrant only, but after the issuing of the draft. The regulation is as follows :

1881.
DEPARTMENT No. 37.
Treasurer's Office No. 37.

"TREASURY OF THE UNITED STATES,
"Washington, D. C., April 6, 1881.

"Treasury drafts and post-office warrants must not be paid until the indorsements conform to the following regulations:

"6. Powers of attorney for the indorsement of drafts in payment of claims must state the number, date, and amount of draft, and number and kind of warrant, and be dated subsequently to the date of the drafts; must be witnessed by two persons, and must be acknowledged by the constituent before the Treasurer of the United States or an assistant treasurer, a judge or clerk of a district court of the United States, a collector of customs, a notary public under his seal, or a justice of the peace in those States only in which such justice has authority to take acknowledgements of deeds, or commissioner of deeds; if before either of the two latter, the certificate and seal of the county clerk as to the official character and signature of the justice or commissioner is required. If executed in a foreign country, the acknowledgment must be made before a notary public, with his seal attached, or a United States consul or minister. The officer taking the acknowledgment must certify that the letter of attorney was read and fully explained to the constituent at the time of acknowledgment, and that said constituent is personally well known to him to be the identical person named in and who subscribed his name to said power of attorney. (See Revised Statutes, secs. 1778 and 3477.)

"JAS. GILFILLAN,
"Treasurer U. S.

"Approved, April 6, 1881:

"WM. LAWRENCE,
"Comptroller.

"Approved:

"WILLIAM WINDOM,
"Secretary of the Treasury."

* Section 14 of the act approved August 18, 1856, reorganizing the diplomatic and consular service (sec. 1752, Rev. Stat.) enacts that "The President is authorized to prescribe such regulations, and make and issue such orders and instructions, not inconsistent with the Constitution or any law of the United States, in relation to the duties of all diplomatic and consular officers, the transaction of their business, the rendering of accounts and returns, the payment of compensation, the safe keeping of the archives and public property in the hands of all such officers, the communication of information, and the procurement and transmission of the products of the arts, sciences, manufactures, agriculture, and commerce, from time to time, as he may think conducive to the public interest. It shall be the duty of all such officers to conform

The practice which tolerates this is "more honored in the breach than in the observance."

2. Assignments by operation of law, as by will, by administration, marriage, bankrupt and insolvency assignments, are not within the statute. (*Erwin v. United States*, 97 U. S., 397; *Goodman v. Niblack*, 102 to such regulations, orders, and instructions." (See *The Floyd Acceptances*, 7 Wallace, 680.)

Under the power thus conferred, the President has prescribed regulations for diplomatic and consular officers, as to the manner of rendering their accounts and receiving their salaries. The regulations governing diplomatic officers as given in "Personal Instructions to the Diplomatic Agents of the United States in Foreign Countries" are stated in sections 35, 36, and 37 of said instructions. They direct certain designated officers to draw on the United States bankers at London, and others to draw on the Secretary of State, for salary and contingent expenses. (Sec. 35.)

Section 36 limits the amounts for which they may draw.

Section 37 prescribes the manner in which drafts shall be drawn, and the voucher necessary to obtain the loss incurred by the sale of the draft.

The "Consular Regulations," prescribed by the President, direct:

1. That accounts of consular officers shall be rendered quarterly. (Sec. 499.)
2. That their several accounts shall be rendered separately. (Sec. 497.)
3. That accounts rendered and drafts drawn on the government shall be in United States money. (Secs. 503, 521.)
4. That drafts of consular officers must be drawn at fifteen days' sight. (Sec. 524.)
5. That drafts must be drawn as per forms 114, 115, given in appendix. (Sec. 527.)
6. That the loss incurred by sale of drafts shall be vouched for as per form 92, appendix. (Sec. 528.)
7. That drafts shall be drawn either on the Secretary of State or the Secretary of the Treasury, as prescribed. (Secs. 530, 531.)
8. That official fees received by a consular officer shall be applied by him to the payment of his salary and expenses, and the surplus (if any) be remitted to the United States bankers at London, or to the United States Treasurer. (Secs. 546, 547.)
9. That when the fees received by a consular officer are less than his salary, he is authorized to draw on the Secretary of the Treasury for the balance due him. (Sec. 549.)

Congress makes annual appropriation to pay loss on salary drafts of consular officers. The other appropriations against which they draw provide for the payment of loss by exchange.

Act February 28, 1803 (Rev. Stat., secs. 4577, 4578), provides that destitute American seamen at foreign ports shall be sent home at the expense of the government. The act is mandatory on the masters of American vessels to carry said seamen, at \$10 each, to a home port, not to exceed two seamen for each one hundred tons burden of the vessel, and it allows the consul to make special rates for any excess over said tonnage, or when they are sent in a foreign vessel. (Art. 16, Consular Regulations.) The consul is required to furnish the master of the vessel with a certificate under seal, giving the number and names of the seamen, the price per man to be paid, and the port at which they are to be delivered. When the seamen are landed, the master presents said consular certificate to the proper customs officer, who certifies thereon to the fact that the seamen named within have been landed, and that the contract with the consul has been filled. (See forms 24 and 25, appendix to Consular Regulations.)

Upon presentation of this certificate to the Treasury Department, an account is stated and the balance due is certified. From the fact that the masters of vessels, as a rule, remain but a short time in port, it is usual for them to assign said certificates. Said assignments have always been recognized by the department and the balance paid to the assignee.

U. S., 560.) As to attachment and garnishee process, see Draft case, 1 Lawrence, Comptroller's Decisions, 23; Bliss *v.* Lawrence, 58 New York, 442; Lidderdale *v.* Duke of Montrose, 4 Term R., 248; Arbuckle *v.* Cowtan, 3 Bos. & Pul., 328; Barwick *v.* Read, 1 H. Blackst., 627.

3. Voluntary assignments for the benefit of creditors are not within the statute. (Goodman *v.* Niblack, 102 U. S., 560.)

4. Assignments may be by implication recognized by the act of June 30, 1864 (13 Stat., 310; Rev. Stat., 1576); and the act of May 8, 1792 (1 Stat., 280; Rev. Stat., 1291.)*

5. So there may be assignments in special cases under the operation of particular statutes, as that of June 16, 1880. (21 Stat., 287, sec. 2. See Allspach's case, 2 Lawrence, Comptroller's Decisions, 260.)

6. In an opinion of May 17, 1877 (15 Op., 271), the Attorney-General said of section 3477 of the Revised Statutes:

"This section has usually been considered to refer to the transfer of unliquidated claims against the United States, and not to apply to those cases where there was a definite ascertained sum due. Whether this construction is or is not correct need not, however, be discussed, as I think it obvious, upon examination of the regulations for the Army, that it can have no application to the transfer by an officer of his pay-account when actually due.

"The regulations of the Army as at present in force are known as the 'Regulations of 1863.' They were prepared by the then Secretary of War, with the approval of the President of the United States, and by the statute of July 28, 1866, they were ordered by Congress to be enforced until that body should otherwise direct. They have, therefore, the force and effect of law.

"By regulation 1349, Article XLV, it is provided: 'No officer shall pass away or transfer his pay-account not actually due at the time, and when an officer transfers his pay-account he shall report the fact to the Paymaster-General and to the paymaster expected to pay it.'

"The prohibition of the transfer of a pay-account when it is not actually due, coupled with the direction as to how the officer shall proceed

* It is the practice to allow officers and seamen in the Navy, and officers, at least in the Revenue Marine, to make allotments of their pay. See Navy Regulations, par. 1, p. 124, and par. 2, p. 125, and department circular as follows:

1873
DEPARTMENT No. 92.
Revenue Marine No. 6.

"TREASURY DEPARTMENT,
"Washington, D. C., July 1, 1873.

"The following additions to and alterations in the Revised Regulations of the Revenue Marine Service are published for the information and government of all persons concerned:

* * * * *

"4. Allotments of pay for the support of the family or other relatives of officers of the Revenue Marine Service may be authorized on their application therefor, in the discretion of the department, for a sum not to exceed, in any case, two-thirds of the monthly pay of the officer desiring it, and for such time only as he may be stationed apart from them, on public duty.

* * * * *

"WM. A. RICHARDSON,
"Secretary of the Treasury."

Any doubt as to the validity of this regulation would seem to be settled by the act of June 30, 1864, which by its terms recognizes assignments on the conditions therein prescribed.

when he transfers it after it has become due, clearly indicates the right on the part of the officer thus to transfer it.

"An examination of the previous regulations of the Army strengthens this view, as the right of an officer to transfer his pay-account when due has been one which has been for a long time recognized."

7. As to judgments in the Court of Claims it has been said by the Attorney-General (15 Op. 221):

"It has been shown that, in the act of Congress which directs the payment of such judgments at the Treasury Department, the money recovered by the judgments in the Court of Claims is considered as a *debt* due by the United States. It is not described as a '*claim*,' and it ceases to have the character of a claim after it has passed into a judgment. A debt, therefore, settled by judgment, and due from the United States; does not seem to me to come within the purview of the act of 1853." (Rev. Stat., 3477; Campbell's case, 2 Lawrence, Compt. Dec., 239; *Howe v. United States*, 19 Wall., 16.)

8. The Court of Claims at one time recognized assignments in some cases upon the ground that section 1072 of the Revised Statutes gave jurisdiction "where the claim has been assigned." (Lawrence's case, 8 Court Cl., 252; Cavender's case, *Id.*, 281. But see *United States v. Gillis*, 95 U. S., 407.)

9. The statute does not apply to claims against the District of Columbia. (*Neufchatel Company's case*, 16 Ct. Cls., 593.)

10. In rare instances some salaries of officers in Washington have been paid in like manner or under power of attorney. This mode of payment will estop officers thus paid from making any other claim on the government therefor. (*Stowe v. United States*, 19 Wall., 16; *McKnight v. United States*, 98 U. S., 186; *Mackey v. Coxe*, 18 How., 105; *Cowdrey v. Vandénburgh*, 101 U. S., 575; *Buffalo Bayou Railroad's case*, 16 Ct. Cls., 238; 16 Op., 263; *Bailey v. United States*, 15 Ct. Cls., 511; *Neufchatel Company's case*, 16 Ct. Cls., 598.)

The exceptions above stated prove the existence of the general rule that claims including salaries are not assignable except as specifically authorized by or under a statute excepting them from the general prohibition of section 3477 of the Revised Statutes.

III. Powers of attorney are not valid to authorize agents to receipt pay-rolls or other vouchers of disbursing officers or agents, or to indorse checks of such officers or agents.

Vast sums of money are paid by disbursing officers and agents to officers for salaries and to parties on other accounts before the allowance of the claim so paid, the ascertainment by an auditor and comptroller of the amount due, and as to which no warrant for payment is ever issued. (Rev. Stat., 56-58, 62, 176, 255, 496, 1153, 1382, 1550, 1563, 1765, 1951, 3144, 3646, 3648, 3658, 3677, 4839, &c.; *McKnight's case*, 13 Ct. Cls., 304.)

The accounts of disbursing officers are settled by the proper auditors and comptrollers, with balances duly certified, and thus the legality of

every payment is passed upon. Many officers and employés are paid by disbursing officers on pay-rolls duly receipted by the persons paid, and these are presented as vouchers for the purpose of settling the accounts of such disbursing officers. Other items are represented by separate vouchers showing payment. It is clear that a valid power of attorney cannot be made authorizing an agent to sign such pay-roll or receipt a voucher or to indorse checks, and that post-dated receipts are unauthorized.

1. This is the necessary effect of the statute. It declares "all transfers and assignments of any claim * * * absolutely null and void," unless, "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof." The allowance and ascertainment and warrant referred to are those provided for in the auditing and payment of claims. (Rev. Stat., 236, 277, 269, 191, 248.) It cannot be properly said that this applies only to such claims as are allowed by auditing officers and certified by comptrollers, and hence does not apply to claims paid by disbursing officers not so audited and certified.

The first declaration of the statute is that all assignments are void. This is general and without exception. There is an exception made in favor of claims audited and certified after the issuing of a warrant for the payment thereof. It is a rule of construction that such exception is not to be enlarged by inference, but must be kept within the bounds marked out clearly or by fair interpretation of the language used. (Sedgwick, Stat. and Const. L., 47, 50, 360; Broom, Leg. Max., 677; *Minis v. United States*, 15 Pet., 445; *Warfield v. Fox*, 53 Pa. St. 382.) This is the rule in construing exceptions in contracts. (2 Pars. Cont., 507, n. (q); *Cardigan v. Armitage*, 2 B. & C., 197; *Bullen v. Deming*, *Id.*, 842; *Jackson v. Hudson*, 3 Johns., 387; *House v. Palmer*, 9 Ga., 497; *Jackson v. Lawrence*, 11 Johns., 191; District Land-Office case, 2 Lawrence, Comptroller's Decisions, 415.)

Claims paid by disbursing officers are not so audited or certified, and no warrant for payment is issued, and hence they are not within the exception, but are covered by the prohibition. Thus it has been said by the Attorney-General of section 3477 of the Revised Statutes that—

"Its obvious intent is to enable the United States to deal *solely* with the persons with whom it contracts, in discharging any obligations that it may be under to them, by the provision that powers of attorney shall be absolutely null and void."

* * * * *

"The language is general which declares the nullity of these assignments, and the only cases where they are recognized is where a warrant is already issued. If there are *any* cases in which the claim could not be paid by warrant, then they *do not come within the exception*, but are affected by the general language." (16 Op., 262, 263; see 9 Op., 188.)

This, in effect, brings claims paid by disbursing officers within the prohibition of the statute. (Rev. Stat., 3477.)

2. The statute places powers of attorney "for receiving payment of any claim" on the same footing with assignments. This is the necessary effect of its language, its purpose, and its policy.

All the reasons upon which the statute against assignments was enacted operate equally against powers of attorney to collect claims of disbursing officers, and against post-dated receipts or vouchers. The rules already cited require the statute to be construed as rendering such powers void. It is unreasonable to suppose that Congress intended to provide against evils as applied to claims paid by warrant, and purposely omitted to include claims paid by disbursing officers, thereby leaving the evils to operate in those very cases in which fewer safeguards against error are provided.

A power of attorney to receive money is not necessarily an assignment of the claim, but it may be employed to defeat the purpose of the statute. It will, if valid, enable a purchaser of the claim to collect it. And if a power so given is not technically an assignment, it can be used to reach the same result, and thus defeat the whole purpose of the statute. Effect is to be given to the purpose of the statute, and it is not to be defeated by adhering too rigidly to its mere letter, or to technical rules of construction. "And we should discard any construction that would lead to absurd consequences." (*Oates v. National Bank*, 100 U. S., 244.) Lord Hale said we should be "curious and subtle to invent reasons and means" to give effect to the intent of the law-making power. (*Id.*, 244.) "A thing which is within the intention of the makers of a statute is as much within the statute as if it were within the letter; and a thing which is within the letter of a statute is not within the statute unless it be within the meaning of the makers." (*Suckley v. Furse*, 15 Johns. 338; *People v. Utica Ins. Co.*, *Id.*, 380; *United States v. Moore*, 95 U. S., 763; *Slater v. Cave*, 3 Ohio St., 85; *United States v. Babbit*, 1 Black, 55; *Oates v. National Bank*, 100 U. S., 244; 9 Bac. Abr., 247, Tit. Stat., I, 5; 1 Kent, 462.) *Scire leges, non hoc est verba earum tenere, sed vim ac potestatem.*

3. The necessary effect of the statute is that it makes void all powers of attorney, orders, or other authorities for receiving payment of any claim upon the United States, unless made after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. The first declaration of this provision is, that all powers for such purpose are void, and there are then excepted from this declaration only such powers as may be executed after the allowance, ascertainment of amount due, and the issuing of a warrant. (*Mackey v. Coxe*, 18 How., 100.)

Corporations are subject to the operation of section 3477 of the Revised Statutes. A corporation therefore cannot execute a power of attorney "for receiving payment of any claim" which is to be paid by a treasury warrant, except after the issuing of the warrant. But the proper financial officer of a corporation, whose authority is subsisting

and without reference to the time of his appointment, may receive payment of a warrant or indorse and collect a draft issued to make payment thereof.

So the proper *financial officer* of a corporation, without reference to the time of his appointment, may receive and indorse checks of disbursing officers given to make payment of claims not to be paid by warrant. If the charter of a corporation authorizes the appointment of more than one financial officer with authority to each to indorse checks and drafts and receive payment of claims, the authority of each one so appointed will be recognized. This necessarily results from the principle that, "in general, the only mode in which a corporation aggregate can act, or contract, is through the intervention of agents, either specially designated by the act of incorporation, or appointed and authorized by the corporation in pursuance of it." (Angell & Ames, Corp. 10 ed., 276; Co. Litt. b.)

The financial officer is, in legal contemplation, the corporation *quoad* the acts he is authorized to perform. The evidence of his authority is not a power of attorney, but a duly certified copy of his appointment, showing his official character and authority. He sustains an *official* relation to the corporation, and in this respect differs from an agent acting under a power of attorney who can not lawfully receive payment of a claim from a disbursing officer.*

* The following form may be found useful:

Form of Authority by Vote.

At a meeting of the Board of Directors of the ————, of ————, held ————, 18—, it was on motion,

"*Resolved*, That John Smith be and is appointed [*or is*] the treasurer or financial officer of said corporation [*or*, that by virtue of the powers conferred by law on said board of directors, David Jones is hereby permanently appointed and constituted a financial officer and agent of said corporation] and is fully authorized and empowered to collect and receive all moneys, claims, and demands which are or may become due or owing to said corporation or any agent or officer thereof, and to receive, indorse and collect all drafts and checks, and all money payable on warrants payable to said corporations or any officer or agent thereof, and to execute all receipts, vouchers, releases, and evidences of payment, and generally to do all acts and execute all instruments in writing required in the execution of his powers."

THIS IS TO CERTIFY, That at a *regular* meeting of the Board of Directors of ————, duly held at ————, on the ———— day of ————, 188—, the foregoing resolution was adopted, and is now in full force.

Witness our hands and the corporate seal, this ———— day of ————, A. D. 188—.

—————, *President.*

—————, *Secretary.*

[Corporate seal.]

The resolution should be certified by officers of the corporation or institution other than the one therein empowered to act.

It is recommended that resolutions be adopted only at *regular* meetings. But when passed at a special meeting, the certificate may be as follows:

We certify that at a *special* meeting of the Board of Directors of ————, duly held

It may be assumed that at common law the holder of a claim, or a party in anticipation of having a claim, can execute a valid power of attorney authorizing an agent to receive payment of the officer of the United States, when it is not intended to operate as an assignment. This rests on the maxim *qui facit per alium facit per se*.

The common law remains in force unless repealed by statute. But the statute has repealed the common-law right to execute powers of attorney except in the one excepted class of cases after the allowance and the issuing of a warrant for payment. If the prohibition does not apply to *powers of attorney* "for receiving payment" of claims to be paid by disbursing officers, then it does not apply against *assignments* of salaries and other claims when so payable. But on principle and the language of the statute it applies in both cases.

The statute in express terms makes void all powers "for receiving payment" except after the issuing of a warrant. When a claimant is paid by a disbursing officer, clerk, or agent, he takes a receipted voucher and issues a check to the order of the claimant. (Rev. Stat. 3622, 5491, 5496, 3620, 3646, 3647; act February 27, 1877, 19 Stat., 249; *Bank of Republic v. Millard*, 10 Wall., 158.)

The indorsement of the check is a means of "receiving payment of a claim," and a power to do this is within the express general prohibition of the statute, and is not within its single exception.

It is true the claimant himself might execute a receipted voucher, receive the check, and deliver it to a party with a power to indorse and collect it. But this does not relieve the transaction of the statutory prohibition. The check is not payment. (Draft case, 1 Lawrence, Comptroller's Decisions, 20; *Buchanan v. Alexander*, 4 How., 20; 2 Pars. Cont. 6th ed., 623; *Hough v. May*, 4 Ad. & El., 954; *Cromwell v. Lovett*, 1 Hall, 56; *Everett v. Collins*, 2 Camp., 515.)

It is not money. Its loss or destruction leaves a right to payment in money.

at ———, on the — day of ———, 188—, at — o'clock — M., the foregoing resolution was adopted, and is now in full force.

And we certify that notice was duly given, personally, to all members of the said Board of Directors of the said time and place of said meeting, and of the object thereof, for more than — days prior thereto, and in time to enable all to attend said meeting; and that at such meeting so held a quorum of all the members of said board was present and voted for the adoption of said resolution.

Witness, &c.

—
Form of Authority under By-laws.

At the regular annual meeting of the stockholders of the ——— ——— ———, of ———, ———, held ———, 18—, ——— ——— was duly elected president, and ——— ——— was duly elected cashier; and as such they are jointly or severally empowered by the by-laws (a certified copy of which is hereto annexed) to [here give the authority substantially as in the resolution above.]

—————, *President.*
—————, *Secretary.*

[Corporate seal.]

4. The construction above given is rendered certain by the acts of June 23, 1874 (18 Stat., 204), and February 27, 1877 (19 Stat., 249).

The act of March 3, 1857 (11 Stat., 249, sec. 1), required disbursing officers to deposit all moneys with the Treasurer of the United States or an assistant treasurer or public depository, and to "draw for the same only in favor of the person to whom payment is to be made." This provision was superseded by the act of June 14, 1866 (14 Stat., 64, sec. 1), carried into the Revised Statutes as section 3620, which latter merely requires the disbursing officer to draw for money "only as it may be required for payments to be made by him in pursuance of law." The provision cited from the act of 1857 was in substance re-enacted June 23, 1874 (18 Stat., 204), as to disbursements made for "charitable, industrial, or other associations," and made general by the act of February 27, 1877 (19 Stat., 249). Under this, as carried into section 3620 of the Revised Statutes (2d ed., 1878), disbursing officers can draw checks only in favor of the persons to whom payment is made "*in pursuance of law.*" This shows a purpose to prevent the assignment of claims—a purpose "to deal solely with the persons with whom it [the government] contracts, in discharging any obligations." (16 Op., 262.) This purpose may be defeated if powers of attorney can be given in advance of the issue of checks to indorse them. They could thus be used as a means of receiving payment of assigned claims.

5. Congress has recognized this construction. The act of January 28, 1882, appropriated \$540,000 for the payment of the final expenses of the Tenth Census, and provided that "the Secretary of the Interior is hereby authorized to compensate those persons who have rendered services as volunteers in connection therewith since the 15th of June, 1881, at the rates of compensation received by such persons severally prior to said date."

The appropriation for the payment of clerks was exhausted June 15, 1881. Many clerks continued in service, taking the risk of an appropriation. They received certificates of service, and in some instances executed powers of attorney to agents to collect and receive payment of these; and in some cases assigned their right to compensation to persons who purchased the same or advanced money thereon. With the assignments, they respectively gave powers of attorney to the several purchasers to collect and receive the compensation.

The disbursing officer of the Interior Department refused to make payment either under the powers of attorney or to pay the purchasers of the claims. Congress, by the act of February 20, 1882, provided that "payment may be made to the assignee or assignees in writing of the amounts payable to such persons respectively, or may be made to such person or persons as shall have received in writing and now hold a power of attorney to collect, have, and receive the said compensation or any part thereof on the certificates issued therefor by the Department of the Interior to the amount advanced by such assignee or per-

son holding such right or power of attorney to such volunteer, together with interest or discount upon such advancement not exceeding the rate of ten per centum per annum."

The indorsement of the check is the only mode by which payment can be secured. Being negotiable, the payee can indorse it to a purchaser. (*Bank of Republic v. Millard*, 10 Wall., 158.) The authority to pay by *check* makes such check, *ex vi termini*, a negotiable instrument, but the statute declares void a power executed by the claimant to receive payment by indorsement.

Such power executed in advance of the issue of a check could readily be employed to defeat the purpose of the statute, and a construction which would permit this is not admissible.

IV. This construction should be given to the statute, because on principles of common law an assignment by a public officer of the future salary of his office is contrary to public policy, and void. The statute must be presumed to have had some other or additional purpose, if it may be so reasonably construed; and such purpose is assigned to it by applying it to salaries after they are due, and to all powers of attorney whenever executed "for receiving payment" of salaries, unless in the cases excepted by the statute of those for the payment of which a warrant has issued.

1. Independently of the statute there are other grounds on which future salaries of officers can neither be assigned, incumbered, or subjected to attachment or garnishee process. In England it is settled beyond doubt that salary for continuing service cannot be assigned, though a pension, or compensation for past services, may. (*Flarty v. Odlum*, 3 T. R., 681; *Lidderdale v. Duke of Montrose*, 4 T. R., 248; *Arbuckle v. Cowtau*, 3 Bos. & P., 328; *Barwick v. Read*, 1 H. Blackst., 627; *Stone v. Lidderdale*, 2 Anst., 233; *Davis v. Duke of Marlborough*, 1 Swanst., 79; *Wells v. Foster*, 8 M. & W., 149; *Palmer v. Bate*, 2 Brod. & Bing., 673; *Hill v. Paul*, 8 Clark & Fin., 307; *Arbuthnot v. Norton*, 5 Moore, Priv. Coun. Cas., 230; *Liverpool v. Wright*, 28 L. J. (N. S.) Ch., 871; *Palmer v. Vaughan*, 3 Swanst., 173; *Parsons v. Thompson*, 1 H. Blackst., 322; *Story*, Eq. Jur., sec. 1040 *d.*; 1 *Parsons*, Cont., 226; *McCarthy v. Goold*, 1 Ball & B., 387; *Grenfell v. Dean, &c.*, of Windsor, 2 Beav., 544; *Jenkins v. Hooker*, 19 Barb., 435; *Collyer v. Fallon*, Turn. & R., 459; see *Brackett v. Blake*, 7 Met., 335; *State Bank v. Hastings*, 15 Wisc., 75.)

One of the reasons for the rule against assignments is that "the law presumes, with reference to an office of trust, that he [the incumbent] requires the payment which the law has assigned to him *for the purpose* of upholding the dignity and performing properly the duties of that office, and therefore it will not allow him to part with any portion of those fees either to the appointer or anybody else. He is not allowed to charge or incumber them." (28 L. J. (N. S.) Ch., 871.)

Some American cases sanction the validity of assignments of salaries

even yet to become due. (*Brackett v. Blake*, 7 Metc., 335; *Mulhall v. Quinn*, 1 Gray, 105; *Macomber v. Doane*, 2 Allen, 541; *State Bank v. Hastings*, 15 Wisc., 78.) But this is denied in *Bliss v. Lawrence* (58 N. Y., 442) with a force of argument which sets the question at rest. Many authorities are collected, and it is in this case said that "The public service is protected by protecting those engaged in performing public duties; and this not upon the ground of their private interest, but upon that of the necessity of securing the efficiency of the public service, by seeing to it that the funds provided for its maintenance should be received by those who are to perform the work at such periods as the law has appointed for their payment." As to assignments by operation of law, see and compare this case with *Goodman v. Niblack* (102 U. S., 559). The same principle is adopted in *Billings v. O'Brien* (45 How., N. Y. Prac. R., 400), supported by many authorities cited.

2. The statute adopts the common-law rule upon this subject, but goes further by declaring that no assignment shall be made, or authority for receiving payment executed, unless "after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

3. The statute does not prohibit the assignment of coupon or registered bonds of the United States, or of coupons. They are excepted from the operation of the statute prohibiting assignments by the express terms of the contract embodied in bonds and coupons, in pursuance of the authority of the "loan acts." Coupon bonds and coupons are, in express terms, negotiable by delivery, while the statutes and authorized "regulations" prescribe the mode of assigning registered bonds. (*Rhawn's case*, 1 Lawrence, Comptroller's Decisions, 109; *Id.*, Appx., ch. xiii; *Moyer's case*, *Id.*, 117; *Sallu's case*, *Id.*, 214.) As to registered bonds, powers of attorney, duly executed, are valid to make assignments. (*Id.*) As to these bonds the maxim applies: *qui facit per alium, facit per se*. For the payment of such bonds and coupons there is a permanent appropriation always applicable. (*Police case*, 1 Lawrence, Compt. Dec., 72, 74; *Ashton's case*, *Id.*, 167; Rev. Stat., 269, 305, 3111, 3691, 3698.) Payments may be made in money, or by drafts upon the Treasurer, or an assistant treasurer. (Rev. Stat., 305, 3593.) These drafts are, as the name imports, negotiable, and they are so recognized by statute. (Rev. Stat., 308, 3645, 3646, 3647, 3652, 4046, 4765, 5413.) They may be indorsed under the authority of a power of attorney, executed even in advance of their issue, because by law they are negotiable, subject to authorized "regulations" which recognize such powers, and are payable to the lawful holder on presentation.

4. For the reasons stated, drafts of the Treasurer of the United States, and checks of disbursing officers and disbursing agents, are negotiable. (Rev. Stat., 306, 307, 308, 3620, 3645, 3652, 3646, 3647, 4765, 5413, 5414; act June 23, 1874 18 Stat., 216; *Bank of Republic v. Millard*, 10 Wall., 158.)

Subject to the exceptions stated, a claim, whether liquidated or unliquidated, against the United States cannot be assigned "unless * * * after the allowance of such claim * * * and the issuing of a warrant for the payment thereof"; nor can a power of attorney, order, or authority for receiving payment of any such claim be executed until after the issuing of such warrant.

TREASURY DEPARTMENT,

FIRST COMPTROLLER'S OFFICE,

January 4, 1882.

**IN THE MATTER OF SALE OF OLD MATERIAL, CONDEMNED STORES, &C.,
NOT NEEDED FOR PUBLIC SERVICE, AND OF THE DISPOSITION TO BE
MADE OF THE PROCEEDS.—PROCEEDS OF SALES CASE.**

1. When a statute assumes the existence of a power to make sales which is not expressly granted by law, and it directs the disposition which is to be made of the proceeds, the exercise of such power has legal sanction. Hence the proper officers have sufficient authority to make sales of the several classes of property mentioned in section 3618 of the Revised Statutes, when, in their judgment, such sales can be made with advantage to the public service.
2. When there is a reasonable doubt arising as to the meaning of provisions of the Revised Statutes, the text, purpose, and history of the original statutes from which such provisions are taken may be considered.
3. Where there are two statutes relating to the same subject, and one is more comprehensive than the other, each should if practicable be construed so as to give one some effect not intended in the other. Hence a specific provision in one of such statutes as to a special class of subjects should generally be construed as constituting an exception to the general provisions of the other statute.
4. The construction given to statutes by executive officers who are charged with the duty of carrying them into effect should, when it has been followed for any considerable period in the practice of the Departments, generally be adhered to.
5. The *gross* proceeds of sales of old material, condemned stores, supplies, and generally of other public property of any kind must be covered into the Treasury as "miscellaneous receipts on account of 'proceeds of government property.'" (Rev. Stat., 3618.)
6. That part of paragraph 1625 of the Regulations of the Army of the United States, promulgated in 1881, which provides that expenses of sale of "condemned military stores and other Army supplies" will be paid from its proceeds, is therefore unauthorized.
7. The gross proceeds of sales, under the War Department, of obsolete and unserviceable ammunition and leaden balls are also to be covered into the Treasury.
8. The gross proceeds of the sales of five of the six excepted classes of property mentioned in section 3618 of the Revised Statutes are, pursuant to the provisions of section 3692, to be covered into the Treasury to the credit, respectively, of the appropriations from which such property was originally purchased. The net proceeds only of sales of marine hospital property and supplies are to be so paid into the Treasury. When such appropriations are special as distinguished from annual or permanent annual appropriations, and they belong to any of the classes mentioned in the first proviso of section 5 of the act of June 20, 1874 (18 Stat., 110) they constitute exceptions to the prohibition in the last clause of section 3685 of the Revised Statutes; and the proceeds covered in may be expended without reappropriation.

9. The *net* proceeds of sales of unserviceable or unnecessary property originally purchased from the marine-hospital fund, as well also the net proceeds of sales of supplies, live stock, vegetables, and forage raised on the grounds of marine hospitals, are to be covered into the Treasury to the credit of said fund, and may be expended for the hospital service without respect of limitation of time or special reappropriation. The *gross* proceeds of sales of *every other class* of public property, except that sold under the act of June 22, 1874 (18 Stat., 200), must be paid and covered into the Treasury.
10. The expenses of sales, including expense of preparing property for sale, are, in those cases in which the gross proceeds are to be covered into the Treasury, a proper charge upon the appropriation for the service to which the property sold pertained, or, if there be no appropriation, then upon the proper contingent fund.
11. In cases of sales of marine-hospital property and surplus or unserviceable hospital supplies, the expenses of preparing the property for sale as well as the proper expenses of sale may be paid either from the gross proceeds or from the general fund in the Treasury. *In such cases only*, except that provided for in the act of June 22, 1874 (18 Stat., 200), and act of March 3, 1875 (*Ib.*, 388), can expenses of sale be deducted from the proceeds.
12. In all cases the accounts of the expenses of sale are to be audited and settled by the proper accounting officers of the Treasury.
13. The act of January 21, 1881 (21 Stat., 317), regulating public advertising in the District of Columbia, has no application to the sales herein mentioned: except in case of the sale of a marine-hospital (Rev. Stat., 4806), the advertising in public newspapers of sales of unserviceable or unnecessary public property is a matter within the discretion of the head of the department to which the property pertains.
14. Unless an officer or agent of the government be authorized by statute to retain for his own use or for some other public use a part of any moneys received by him "for the use of the United States," or by virtue of his authority as an officer or agent of the United States, the gross amount of such moneys must, under the provisions of section 3617 and 3618 of the Revised Statutes, be paid into the Treasury without any abatement or deduction whatever.

December 22, 1881, the Secretary of the Interior addressed a letter to the First Comptroller, stating that it has been the custom in that department to make an annual sale of old material and condemned office property, as follows: An inventory of such property was furnished to an auctioneer, with directions to sell the inventoried property; then the proceeds, less expenses of sale, including commissions, were by the department deposited in the Treasury as "miscellaneous receipts," on account of "proceeds of government property" (Rev. Stat., 3618); and the inquiry is made, Is this mode authorized by law? Inquiry is also made as to whether the act of January 21, 1881 (21 Stat., 317), in relation to advertising in newspapers in the District of Columbia, applied to such sales.

October 14, 1881, the Supervising Surgeon of Marine Hospital Service addressed a letter to the Secretary of the Treasury, asking that "the First Comptroller be requested to give a decision in writing as to the proper disposition of receipts from the sale of unserviceable hospital property, surplus live stock, vegetables, and forage sold by the Marine Hospital Service, originally purchased from its fund, or raised upon the grounds by the labor of the employés."

October 18, 1881, this was by the Secretary referred to the First Comptroller for an expression of his opinion.

The Revised Statutes provide that:

"SEC. 3617. The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in the next section, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post-Office Department. (Act March 3, 1849, 9 Stats., 398.)

"SEC. 3618. All proceeds of sales of old material, condemned stores, supplies, or other public property of any kind (Act May 8, 1872, 17 Stats., 83), except the proceeds (1) of the sale or leasing of marine hospitals, or (2) of the sales of revenue cutters (Act April 20, 1866, 14 Stats., 40; Act May 8, 1872, 17 Stats., 83), or (3) of the sales of commissary stores to the officers and enlisted men of the Army (Act September 28, 1850, 9 Stats., 507; Act July 28, 1866, section 25, 14 Stats., 336; Act May 8, 1872, 17 Stats., 83), or (4) of materials, stores, or supplies sold to officers and soldiers of the Army (Act March 3, 1875, 18 Stats., 410; Act February 27, 1877, (19 Stats., 249), or (5) of the sale of condemned Navy clothing (Act March 3, 1847, 9 Stats., 171), or (6) of sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law (Act June 8, 1872, 17 Stats., 337), shall be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of government property,' and shall not be withdrawn or applied, except in consequence of a subsequent appropriation made by law." (Act May 8, 1872, 17 Stats., 83; see 15 Op. Att. Gen., 322.)

"SEC. 3672. A detailed statement of the proceeds of all sales of old material, condemned stores, supplies, or other public property of any kind except materials, stores, or supplies sold to officers and soldiers of the Army, or to exploring or surveying expeditions authorized by law, shall be included in the appendix to the book of estimates." (See Rev. Stats., 72, 197, 397, 1241, 1540, 1541, 3783, 4675.)

There are six excepted classes of proceeds of property enumerated in section 3618 and excepted from the general words of that section. These proceeds of sales are to be covered into the Treasury, but under the express provisions of section 3692, they "respectively revert to that appropriation out of which they [the articles sold] were originally purchased," and, except in cases hereafter to be shown, they may, without subsequent appropriation by law, be expended for the purpose for which the original appropriation was made.

The act of June 22, 1874 (18 Stats., 200), authorized and directed the Secretary of War to cause to be sold, "* * * all obsolete and unserviceable ammunition and leaden balls, and the surplus of pig lead * * * now [at date of the act] stored in the various arsenals * * *, and to cause the net proceeds of such sale, after paying * * * all the necessary expenses of such sale, * * * to be covered into the Treasury of the United States * * *."

The "United States Army Regulations" promulgated in 1881, under

the act of June 23, 1879 (21 Stats., 34), after citing on page 187, sections 3618 and 3692 of the Revised Statutes, contain these provisions:

1622.—*The proceeds* of sale of all public property, not especially excepted in the preceding paragraph, must be paid into the Treasury as miscellaneous receipts, without any abatement or reduction whatever, by being deposited to the credit of the Treasurer of the United States, in general account either at the Treasurer's own office or at the office of one of the United States Assistant Treasurers, or with some designated public depository of the United States.—[G. O. 81, 1872; Cir. No. 80, 1872, Treasury Dept.]

1623.—*Net proceeds only* of sales of the following-named property are deposited in Treasury to credit of miscellaneous receipts, viz: The old caannon, arms, and other ordnance stores in possession of the War Department on 20th of July, 1868. and all obsolete and unserviceable ammunition, leaden balls, and surplus pig-lead. *Costs and expenses of breaking up and preparing said ammunition for sale, and all necessary expenses of such sale, including cost of transportation to place of sale,* are to be paid out of *proceeds of sale*, and the *net proceeds only* are carried by the Treasury to credit of miscellaneous receipts.—[Joint Res. of 20 July, 1868 (15 Stats., 259); Act of June 22, 1874 (18 Stats., 200).]

1624.—For all such deposits (proceeds of sales) certificates of deposit in duplicate or triplicate should be issued by the several depositaries, giving the name and official title of the depositor, and stating that they are on account of "proceeds of government property." The bureau or office to which the property appertains should also be given on the face or back of each certificate, and an explanation of the kind and amount of property sold, and the original of these certificates should always be forwarded to the Secretary of the Treasury as soon as they shall have reached the depositor.—[G. O. 81, 1872.]

1625.—Military stores and other Army supplies regularly condemned and ordered for sale, shall be sold for cash at auction, on due public notice, and in such market as the public interest may require. The officer making the sale will bid in and suspend the sale when, in his opinion, better prices may be obtained. Expenses of the sale will be paid from its proceeds. The auctioneer's certified account of the sales in detail, and the vouchers for expenses of the sale, will be reported to the chief of the department to which the property belonged. (Account of sales—Form No. 41, Qr. Mr's. Department.)—[Regs., 1863, ¶ 1032; Act June 8, 1872, chap. 348, 17 Stats., 337.]

1626.—The furnishing of stores or public property from one bureau or department of the government to another is not regarded as a sale. If money is received therefor it can be used to replace such stores, and will be reported for cover-in to the credit of the appropriation from which the stores were originally purchased.—[G. O. 20, 1874.]

The Revised Statutes also contain these provisions:

"SEC. 4801. The President is authorized to receive donations of real or personal property, in the name of the United States, for the erection or support of hospitals for sick and disabled seamen. (16 July, 1798, c. 77.)

"SEC. 4802. The Secretary of the Treasury shall, from time to time, appoint a surgeon to act as supervising surgeon of marine-hospital service, who shall, under the direction of the Secretary, supervise all matters connected with the marine-hospital service, and with the disbursement

of the fund for the relief of sick and disabled seamen. [The President now appoints under the act of March 3, 1875, ch. 156, sec 7.]

"SEC. 4803. The several collectors of the customs shall respectively deposit, *without abatement or reduction*, the sums collected by them under the provisions of law imposing a tax upon seamen for hospital purposes, with the nearest depository of public moneys, and shall make returns of the same, with proper vouchers, monthly, to the Secretary of the Treasury, upon forms to be furnished by him. All such moneys shall be placed to the credit of 'the fund for the relief of sick and disabled seamen'; of which fund separate accounts shall be kept in the Treasury. Such fund is appropriated for the expenses of the marine-hospital service, and shall be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen employed in registered, enrolled, and licensed vessels of the United States."

SEC. 4585. There shall be assessed and collected by the collectors of customs at the ports of the United States, from the master or owner of every vessel of the United States arriving from a foreign port, or of every registered vessel employed in the coasting trade, and before such vessel shall be admitted to entry, the sum of forty cents per month for each and every seaman who shall have been employed on such vessel since she was last entered at any port of the United States; such sum such master or owner may collect and retain from the wages of such seamen." [See § 4803.]

"SEC. 3692. All moneys received from the leasing or sale of marine hospitals, or the sale of revenue-cutters, or from the sale of commissary stores to the officers and enlisted men of the Army [or from the sale of materials, stores, or supplies sold to officers and soldiers of the Army], or from sales of condemned clothing of the Navy, or from sales of materials, stores, or supplies to any exploring or surveying expedition authorized by law, shall respectively revert to that appropriation out of which they were originally expended, and shall be applied to the purposes for which they are appropriated by law."

Section 3689 makes a permanent annual appropriation as follows:

"Marine-hospital establishment (customs):

"Of the moneys collected from masters or owners of vessels of the United States, at the rate of forty cents per month for every seamen employed, to constitute a general fund to be used for the benefit and convenience of sick and disabled American seamen." See also sections 4545, 4569, 4586, 4806; act of July 16, 1798 (1 Stat., 605); and act February 28, 1803 (2 Stat., 203.)

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

Section 3618 of the Revised Statutes contains a general provision in respect of the disposition to be made of proceeds of sales, specifying several classes of sales of specially described property, and in order to include sales of similar property the words "other public property of any kind" are added.

The sales which are referred to in this section, and which are now to be considered, relate to unserviceable or surplus chattel property originally purchased for use in the various branches of the government service. These sales may, for the purposes of the present inquiries, be arranged into classes:

First. Sales under the authority of heads of departments generally.

Second. Sales under the War Department other than such as are included in any of the six excepted classes mentioned in section 3618 of the Revised Statutes.

Third. Sales of the six classes of property excepted in section 3618 from the general words of this section.

Fourth. Sales of unserviceable property originally purchased from the marine hospital fund.

Fifth. Sales of surplus live stock, vegetables, and forage raised on the grounds of hospitals by the labor of the employés.

As to these several classes the questions for consideration are:

First. Can the expenses of sales in each, or in any case, be deducted from the gross proceeds?

Second. What disposition is to be made in each case of the gross or net proceeds?

Third. Can property of any class not required for public use be exchanged for supplies, services, or other property?

The statutes cited do not, in explicit terms, give an authority to sell, and with the exception of the marine-hospital realty there is no general statute which does; but the authority to sell is implied.* (United States *v.* Macdaniel, 7 Pet., 14; Inspectors' case, 1 Lawrence, Comptroller's Decisions, 203.) This is settled by a long usage which is recognized in the various provisions of law in respect of sales of unserviceable or unnecessary public chattels. (Peirce *v.* United States, 1 Court Cl., 270; Floyd Acceptances, 7 Wall., 666.) The usage is justified upon the principle that when a statute assumes the existence of a power, and makes explicit provision for the mode of its exercise, it thereby intends that the power may be exercised, and hence if the power did not previously exist such intent is equivalent to a grant of the power. (State *v.* Miller, 23 Wisc., 634; 14 Op. Att. Gen., 420.) So when a statute assumes the existence of a power to sell certain property, and pursuant to such assumption it makes a disposition of the proceeds of the sale, the power to sell must certainly exist. (15 Op. Att. Gen., 322.)

If the question whether the gross proceeds of sales or the net proceeds thereof only, after deducting expenses of sale only, are to be "covered into the Treasury," ought to be determined solely upon the provisions of sections 3617 and 3618 of the Revised Statutes, and in the connection in which they have been compiled, it might be urged with much force that the gross proceeds only should be so disposed of. The former section requires the "gross amount of all moneys received from whatever source" to be paid into the Treasury without any deduction, "except as otherwise provided in the next section." The latter section requires

* Why, then, it may be said, did Congress deem it necessary by joint resolution of July 20, 1868 (15 Stats., 259), and again by act of June 22, 1874 (18 Stat. 200), to confer by law authority on the Secretary of War to sell obsolete and unserviceable ordnance stores? The answer is, that the resolution and act were unnecessary legislation.

"all proceeds of sales of old material * * * or other property," except of the six specified classes, to be "covered into the Treasury as miscellaneous receipts." Under one section the "gross amount" is specified; under the other, "all proceeds." This difference in phraseology gives some color to the idea that because of this difference and the implied power to sell, only net proceeds of sales are required by section 3618 to be covered into the Treasury. But, for several reasons, no such construction can be adopted.

1. When the meaning of the Revised Statutes is plain, it is not allowable, in order to ascertain their meaning, to recur to the original statutes from which they have been taken. But the latter may be referred to when it is necessary to ascertain the meaning of doubtful language in the revision. (*United States v. Bowen*, 100 U. S., 508.) In view of the practice in the Interior Department referred to, it may be assumed that the language of section 3618 is not plain; that it is doubtful whether the words "all proceeds" mean gross or net proceeds. In all such cases "the general intention of the act may be inferred from the previous legislation." (*Minis v. United States*, 15 Pet., 441.) The history of a statute is always useful in ascertaining its meaning (*id.*; *Cooley*, Const. Lim., 65, citing *Baltimore v. State*, 15 Md., 376, and other cases.)

2. And the revision recognizes this rule of construction by declaring that "no inference of a legislative construction is to be drawn by reason of the title under which any particular section is placed." (Rev. Stat., 5600.) Hence, the meaning of section 3618 is to be gathered by an examination of the original statutes, the usage under them, and their history and purpose.

3. If sections 3617 and 3618 are to be construed together, no support is given to the idea that under the latter section only net proceeds of sales are to be covered into the Treasury. Section 3617 requires the "gross amount of all moneys received from whatever source for the use of the United States" to be paid into the Treasury. This language is general and comprehensive. Section 3618 says that "*all proceeds* of sales" of specified property, "or other public property of any kind," shall be covered into the Treasury.

a. The expression "all proceeds" is sufficiently comprehensive to be interpreted as meaning "gross" amounts. It is equivalent to the expression "total receipts."

b. If there were no provisions in either of these two sections other than the similar clauses in each requiring "the gross amount" and "all proceeds of sales" to be covered into the Treasury, a different purpose should, if practicable, be assigned to the different phraseology. (*United States v. Moore*, 95 U. S., 763; *N. L. & B. Inst. v. Com.*, 14 B. Monroe, 266; *Sedgwick*, Stat. and Const. L., 211; *Dodge v. Gridley*, 10 Ohio, 176.) But in this case such construction would be improper, because each of the provisions refers unmistakably to all proceeds of sales. Both are abso-

lutely comprehensive of all proceeds. Section 3617 requires the gross amount of all moneys, received from whatever source, "except as otherwise provided in the next section," to be paid into the Treasury. The exception referred to does not relate to the question of gross or net proceeds. It merely provides that the proceeds of sales of six named classes of property need not to be covered into the Treasury on account of "proceeds of government property." These proceeds, by force of section 3692, are, in the words of the statute, to "revert to that appropriation out of which they were originally expended;" that is, to the appropriation made for the purchase of the articles sold. The exception is as to the payment into the Treasury in such manner that the moneys may not be expended without express appropriation, and not as to payment into the Treasury of gross or net proceeds of sale. The repetition in section 3618 of a declaration that "all proceeds of sales * * * shall be covered into the Treasury," in as broad terms as the declaration in section 3617 that "the gross amount * * * shall be paid into the Treasury," was designed as an introduction on which to engraft the six classes of property excepted in the former section, none of the proceeds of which are necessarily required to be paid into the Treasury.

4. This result follows from an examination of the original statutes. Section 3617 was compiled mainly from section 1 of the act of March 3, 1849. (9 Stats., 398.) This section is substantially in the same words as those used in the Revised Statutes. Although it specifies receipts from customs duties and sales of public lands, and section 3617 does not, nevertheless these receipts are sufficiently covered by the general words of section 3617.

The established and general policy ascertainable in the provisions of sections 3617 and 3618 of the Revised Statutes, and in the acts from which these sections were taken, is that the gross amounts of all moneys accruing to the government, including those arising from all sales, in the absence of express authority to the contrary, should be paid and covered into the Treasury, and not be paid out without subsequent appropriation. Section 3617 excepted only one source of revenue from so being paid, namely, "the revenues of the Post-Office Department."

The act of 1849 neither gave nor recognized by implication a power of sale. The act of May 8, 1872, carried into section 3618, declares that, excepting certain proceeds therein named, "all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind shall hereafter be deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of government property,' and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law * * *." This act recognized a general power of sale of all classes of property, and it determined the disposition of the proceeds.

Effect can, and should, be given to sections 3617 and 3618 of the Revised Statutes.

Section 3619 of the Revised Statutes provides that:

SEC. 3619. Every officer or agent who neglects or refuses to comply with the provisions of section thirty-six hundred and seventeen shall be subject to be removed from office, and to forfeit to the United States any share or part of the moneys withheld to which he might otherwise be entitled.

It might be urged with some force that the fact that this section is not in terms made applicable to section 3618 shows that a different purpose or effect should be applied to that provision of section 3617 which requires "the gross amount of all moneys" to be paid into the Treasury from that which should be applied to the provision of section 3618, requiring "all proceeds of sales" to be covered into the Treasury.

If the Revised Statutes had been originally enacted as one act there might be some plausibility in this view. But it is a compilation of prior statutes. Section 3617 was taken from the act of March 3, 1849, and section 3619 from the act of July 18, 1866, which was amendatory of that of 1849, and hence these sections assume the form in which they are incorporated in the revision.

But the expression "all proceeds" in section 3618 is taken from the act of March 3, 1847, and the expression "gross amount" in section 3617 from the act of March 3, 1849. Both expressions are comprehensive—sufficiently so to include the total proceeds of sales. Neither one of these statutes, separated by years in their enactment, was passed with reference to the words employed in the other, and with a view to produce a different result by the employment of different words. When two separate sections in the Revised Statutes are found upon the same subject, one more comprehensive than the other, by a rule of construction already stated, a purpose should be assigned to each as not comprehending the subject-matter of the other. If this rule should be applied in this case, it would not change the decision now made. The question whether section 3617 includes all the proceeds mentioned in section 3618 so as to bring all within the penal operation of section 3619 is not now presented for decision. But whether so or not, the result arrived at in this case cannot be affected thereby. Section 3 of the act of September 28, 1850 (9 Stats., 507), is a legislative construction that all proceeds of sales of government property were, in the meaning and intention of Congress, within the provisions of section 1 of the act of March 3, 1849 (*ib.*: 398), from which section 3617 of the Revised Statutes was compiled. Hence unless, as in the case provided for in the act of 1850, there be special statutory direction in respect of proceeds of sales of any class of public property, any failure to deposit the gross proceeds would be a violation of section 3617, and section 3619 would apply.

There are six classes of property specified in section 3618 which were, by various acts, excepted from the general provision of law requiring proceeds of sales to be covered into the Treasury and not to be expended without subsequent appropriation, namely, by the acts of April 20, 1866

(14 Stats., 40), May 31, 1872 (17 Stats., 83), September 28, 1850 (9 Stats., 507), July 28, 1866 (14 Stats., 336), May 3, 1872 (17 Stats., 83), March 3, 1875 (18 Stats., 410), March 3, 1847 (9 Stats., 171), and June 8, 1872 (17 Stats., 337).

None of these acts relate to the question in respect of paying in the gross or net proceeds. Upon the original statutes, so far considered, the gross proceeds of all sales other than those within the exception of section 3618 of the Revised Statutes are to be covered into the Treasury.

5. The same result follows from another consideration: It was in substance provided in paragraph 1032 of the "Army Regulations of 1863" that the expenses of sales of military stores and of other Army supplies regularly condemned should be paid from the proceeds. But section 5 of the act of May 8, 1872 (17 Stat., 83), which has been carried into section 3618 of the Revised Statutes, required "*all proceeds* of sales of old material, condemned stores, supplies, or other public property of any kind," excepting only receipts of sales of marine hospitals, revenue cutters, condemned Navy clothing, and commissary stores sold to officers of the Army, to be covered into the Treasury. This section of the act of 1872 was regarded as abrogating the provision of paragraph 1032 of the Army Regulations referred to. As such effect was not perhaps intended, the act of June 8, 1872 (17 Stat., 337), declares that section 5 of the act of May 8, 1872, "should not be held to repeal" the provision of the Army Regulations which directs the expenses of sales of "military stores or supplies regularly condemned" to be paid from the proceeds. The act of June 8, 1872, was a legislative construction of the act of May 8, 1872, that the gross proceeds of other sales which are not specially excepted from the general provisions of law should be paid into the Treasury. *Expressio unius est exclusio alterius.* (See District Land Office case, 2 Lawrence, Compt. Dec., 421.) Paragraph 1032 of said Army Regulations of 1863 is now paragraph 1625 of the Army Regulations of 1881. Is this a valid regulation? Of course a regulation made by the head of a department cannot be operative if it be in conflict with a statute. The act of June 8, 1872 (17 Stat., 337), which gave effect to this regulation, is not wholly incorporated with the Revised Statutes. That clause of the act relating to "military stores or supplies regularly condemned" has not been incorporated with section 3618 of the Revised Statutes, or with any other section; hence it has, by section 5596, been declared to have been repealed. Unless the omitted portion of this act can be considered as being still in force, and it cannot, paragraph 1625 of the Army Regulations of 1881 is in conflict with the statutes, and is therefore void and of no effect. (Audit case, 1 Lawrence, Compt. Dec., 43 n.; Edmunds' case, 2 Lawrence, Compt. Dec., 528.) This view of the case is supported by the act of June 22, 1874 (18 Stat., 200), which authorized the Secretary of War to sell "all obsolete and unserviceable ammunition and leaden balls * * * " then stored in various arsenals, "*and to cause the net*

*proceeds of such sale, after paying all costs and expenses, * * * to be covered into the Treasury of the United States * * *.*" This is a legislative construction that without such enactment the expenses of the sale could not have been paid from the proceeds. The power to sell such property already existed by express provision of the act of March 3, 1825, now section 1241 of the Revised Statutes, which authorizes the President, and therefore the Secretary of War, to "cause to be sold any ordnance, arms, ammunition, or *other military stores*, or subsistence or medical supplies, which * * * shall appear to be damaged or otherwise unsuitable for the public service * * *." Section 3618 of the Revised Statutes directs that proceeds of sales of "public property of *any kind*" should be covered into the Treasury, and thus tacitly admits the existence of a power to sell such property. The act of 1874 was necessary, not to grant a power to sell, but to authorize the expenses of such sale to be deducted from the proceeds. See in this connection the provision in respect to such sales under Navy and War Departments, contained in the act of March 3, 1875 (18 Stat., 388), from which it might be implied that expenses of sales of useless ordnance in the War Department as well as in the Navy Department might be deducted from proceeds.

While it is true that the Army Regulations of 1881 were codified and published under the authority of section 2 of the act of June 23, 1879 (21 Stats., 34), and that the recognition by Congress of a regulation or practice of an executive department generally gives, if it were otherwise wanting, legal effect to such practice or regulation, it does not in this case follow that the provision in paragraph 1625 of the codified Regulations in respect of paying expenses from proceeds of sales is valid, for the act of 1879 authorized the codification only of such regulations of the Army as were in force at the date of this act. It has already been shown that paragraph 1032 of the Regulations of 1863 was inoperative after the enactment of the Revised Statutes, because of the omission from the revision of that part of the act of June 8, 1872, which had recognized its validity; hence paragraph 1625 of the codified Regulations is now inoperative.

6. This question should, in respect of proceeds of sales of public property which are not specially excepted from the operation of the general provisions of law, be considered as settled by decisions and usage. On the 11th of May, 1872, the Secretary of the Treasury asked the opinion of the First Comptroller on this subject in respect of the provisions of section 5 of the act of May 8, 1872, and the latter officer rendered the following opinion:

TREASURY DEPARTMENT,
First Comptroller's Office, May 13, 1872.

SIR: I have to acknowledge the receipt of your letter of the 11th instant, inclosing copy of the fifth section of the legislative, executive, and judicial appropriation act, approved May 8, 1872. You inquire—

First. Whether this section goes into effect before the 1st of July next?

Every provision of law is of present effect, except when otherwise provided. The act, of which this is a portion, is one making appropriations for the fiscal year 1872, but its general purpose has no relation to this specific provision and does not control it. This section neither makes nor controls the use of any appropriation contained in the act; it is independent of other provisions, and is not affected by the portion which limits the period during which appropriations can be used. I answer, therefore, that it went into effect on the approval of the bill.

Second. Does it apply to the sale of new material from one department or bureau to another, or is it confined to old and condemned public property?

It applies to all kinds of property, old or new, condemned or uncondemned, with certain exceptions contained in the second sentence, and to sales by one department or bureau to another. The language is, "that all sales of old material, condemned stores, supplies, or other public property of any kind shall hereafter" be covered into the Treasury as miscellaneous receipts. The words "or other public property of any kind" are very comprehensive, and exclude the construction suggested in the question.

I do not mean to say that when one branch of the service makes some article, as a piece of furniture, from its own material, and at its own expense, for and upon the request of another branch, that the cost must be covered in as a miscellaneous receipt.

Third. Proceeds of paper shavings sold by the Congressional Printer must be paid in under this section.

Fourth. The act says, "all proceeds of sales," &c., "or other public property," and thus embraces all receipts and all property sold. The expenses attending a sale cannot be deducted, for that would defeat a compliance with the requirement "that all proceeds of sales" shall be paid in, &c.

I am, very respectfully,

R. W. TAYLER,
Comptroller.

Hon. GEORGE S. BOUTWELL,
Secretary.

Pursuant to this opinion the Secretary of the Treasury issued the following "instructions concerning the disposition of the proceeds of sales of public property under the fifth section of the act of May 8, 1872, and an act amendatory of said section, approved June 8, 1872."

1872.
DEPARTMENT NO. 80.
Ind't Treasury Division No. 7. }

TREASURY DEPARTMENT, *July 9, 1872.*

* * * * *

All officers of the United States are instructed that the proceeds of sales of public property, of every character and description, excepting such as pertain to marine hospitals, revenue cutters, the clothing fund of the Navy, and the sale of materials, stores, or supplies to officers and soldiers of the Army, or to exploring and surveying expeditions authorized by law, which are to be disposed of in accordance with former provisions of law, must be immediately paid into the Treasury as miscellaneous receipts, without any abatement or deduction whatever, excepting the expenses of sales of military stores or supplies regularly

condemned, which, under paragraph 1032, Revised Army Regulations of 1863, and the act of June 8, 1872, are authorized to be paid from the proceeds of such sales,* by being deposited to the credit of the Treasurer of the United States in general account, either at the Treasurer's own office or at the office of one of the United States assistant treasurers, designated or national bank depositories.

For all such deposits, certificates of deposit, in duplicate or triplicate, should be issued by the several depositories, giving the name and official title of the depositor, and stating that they are on account of "proceeds of government property." The bureau or office to which the property appertains should also be given on the face or back of each certificate, and an explanation of the kind and amount of property sold, and the original of these certificates should always be forwarded to the Secretary of the Treasury as soon as they shall have reached the depositories. * * *

GEO. S. BOUTWELL,
Secretary of the Treasury.

The construction given to statutes by executive officers who are charged with the duty of carrying them into effect, should, when it has been followed for any considerable period in the practice of the department, generally be adhered to. (*United States v. Moore*, 95 U. S., 763; *Edwards v. Darby*, 12 Wheat., 210; *United States v. State Bank*, 6 Pet. 29; *United States v. Macdaniel*, 7 Pet., 14; *United States v. Bowen*, 100 U. S., 511.) But if such construction be clearly erroneous, it should not be followed. (See such a case in Finance Report, year 1856-'7, pp. 82-89.)

As to the question, "What disposition is to be made in each case of the gross or net proceeds of sales?" the answer is, that when not otherwise excepted by law, they are to be paid into the Treasury without any abatement or deduction whatever (Rev. Stats., 3617), and be covered in "as miscellaneous receipts on account of proceeds of government property," and not "be withdrawn or applied except in consequence of a subsequent appropriation made by law. (*Ib.* 3618.) The classes of proceeds of sales of property excepted from this mode of disposition are enumerated in section 3618 of the Revised Statutes. The language of section 3692, in respect of such proceeds, is that they "shall respectively revert to that appropriation out of which they were originally expended;" that is to say, according to the act of March 3, 1847 (9 Stats., 171, sec. 1), from which the provision is partly taken, "to that appropriation from which such [property] stores and other articles were originally purchased." On this language, and in view of the two years' limitation prescribed in section 5 of the act of June 20, 1874 (18 Stats., 110), in respect of expenditure of appropriation, a question may arise as to whether the reverted proceeds of the excepted classes of sales can be expended without subsequent appropriation when the original appropriation has "remained upon the books of the Treasury for two fiscal years."

* It has already been shown that the *gross* proceeds of sales of "military stores or supplies regularly condemned," must now be deposited as proceeds of government property, without any deduction therefrom on account of "expenses of sales." (*Ante*, 45.)

As to the proceeds of sales of revenue cutters, which are generally built from "permanent specific appropriations," the proceeds may be expended without limitation as to time, because such appropriations are not intended to be covered into the Treasury under the act of June 20, 1874. (18 Stats., 110, sec. 5.) But as to proceeds of sales of articles which were originally purchased from any annual appropriation, and which accrue after such appropriation has remained upon the books of the Treasury for two fiscal years, they are not available for current use. (*Ib.*)

The general words of sections 3617 and 3618 of the Revised Statutes do not apply to proceeds of sale of unserviceable supplies or other property originally purchased from the marine-hospital fund, or to proceeds of sale of surplus live stock, vegetables, or forage raised by employes on the hospital grounds.

The last clause of section 3685 of the Revised Statutes provides that "in no case shall any special appropriation be available for more than two years without further provision of law." Therefore, unless such appropriation belongs to one or other of the classes mentioned in the first proviso of section 5 of the act of June 20, 1874 (18 Stats., 110; 1 Lawrence, Compt. Dec., Appendix, p. 578), or is otherwise excepted by law from the operation of section 3685, the proceeds of sales of articles originally purchased from such an appropriation cannot, without reappropriation, be expended when such appropriation has remained on the books of the Treasury two fiscal years.

The statute authorizes the President "to receive donations of real or personal property, in the name of the United States, for the erection or support of hospitals for sick and disabled seamen." (Rev. Stats., 4801.) The supervision of "*all matters* connected with the Marine Hospital Service" is "under the direction of the Secretary of the Treasury." (*Ib.*, 4802.) The several collectors of customs, respectively, are required to "deposit, without abatement or reduction, the sums collected by them under the provisions of law imposing a tax upon seamen for hospital purposes, and with the nearest depository of public moneys." The taxes so collected are to be placed to the credit of "the fund for the relief of sick and disabled seamen employed in registered, enrolled, and licensed vessels of the United States." (*Ib.*, 4803.) The property donated by private individuals for the erection and support of Marine Hospitals, when accepted by the President, becomes the public property of the United States. Congress, by the act of April 20, 1866 (14 Stats., 40), which authorizes the Secretary of the Treasury to sell or lease such marine-hospital buildings and lands appertaining thereto as he may deem advisable, has recognized the title of the United States in such realty as proprietary not only in name but for all purposes of grant and conveyance. In respect of such property the United States can, in proper cases, maintain actions of ejectment, replevin, or trover, and in respect of movable property of the hospitals it may maintain an action in detinue. But when any ma-

rine-hospital property is sold, the same act shows an unmistakable intention on the part of Congress to appropriate the whole proceeds of the sale to the benevolent object for which the property had been donated or originally purchased; "the proceeds of said leases and sales are hereby appropriated for the marine-hospital establishment." This act is sufficiently incorporated into sections 3618 and 3692 of the Revised Statutes to show that such property may be sold, and that no appropriation of the proceeds for any object other than that stated was intended by Congress. Similarly the moneys "collected under the provisions of law imposing a tax upon seamen for hospital purposes" are public moneys of the United States, as much so as if they were collected from customs duties or internal-revenue taxes. In respect of the moneys so collected, the intention of Congress is as unmistakable as it is in respect of the proceeds of sales or leases of marine-hospital realty. "All such money shall be placed to the credit of the fund for the relief of sick and disabled seamen." (Rev. Stat., 4803.) These words indicate an intention on the part of Congress that the sick and disabled seamen referred to shall have all the benefit of all the hospital-tax collected. Could such intent be carried out if any portion of the moneys were to be covered into the Treasury and become a part of the "moneys not otherwise appropriated," and thus become liable to be withdrawn from the Treasury under appropriations "from moneys not otherwise appropriated," and be expended for other than the Marine Hospital Service? Yet such would be the effect under any construction of law which would regard the marine-hospital tax as other than a special fund created for one special object and intended to be *always available* for this object. But the intention of Congress is clear on this point; the fund "is appropriated for the expenses of the Marine Hospital Service"; it is "to be employed, under the direction of the Secretary of the Treasury, for the care and relief of sick and disabled seamen." (*Ib.*, 4803.) The intention plainly is that this fund shall be used solely for the benefit of sick and disabled seamen. No language could be stronger or more exact than that used by Congress in showing this intention. The legislation is on a special subject; it has been incorporated into the Revised Statutes as permanent law. If there is anything in this legislation which would conflict with the general law relating to public money or public property, such thing is by the rules of construction to be regarded as an exception to the general law. If the proceeds of the hospital tax are so firmly secured to the marine-hospital fund that no part of them can be used for or devoted to any other object or purpose, it necessarily follows that the proceeds of sales of property purchased from this fund cannot be used for any purpose other than that for which the fund itself was created. The transmutation of the money of the fund into articles for the use of the hospital service and the retransmutation of such articles into money cannot be allowed to defeat the intention of Congress, which is that the "sick and disabled seamen" shall have the whole beneficial interest in the fund.

It was not intended that the United States Treasury should derive any benefit from the hospital tax. But if any part of the proceeds of sales of condemned or unnecessary hospital supplies were to be covered into the Treasury, so as to be unavailable for hospital purposes, the Treasury would be benefited and sick and disabled seamen would be injured to the extent of the amount so covered in. That which cannot be done directly cannot be done indirectly.

2. Section 3617 relates to moneys received from whatever source "for the use of the United States." The marine-hospital fund and property are in one sense for the use of the United States, but they are by express law appropriated to the special use of the Marine Hospital Service, which in part is founded on private charity, and mainly, if not altogether, supported by a tax on the earnings of seamen. The marine hospital and fund are public property, but as they are devoted to a special purpose, the application of them to any other purpose would require a change in the statute and involve a breach of good faith. Section 3618 relates to the sale of "old material, condemned stores, supplies, or other public property of any kind." The specially described property pertains to the general public service. The words "other public property" are by their context restrained to property of the same class, the proceeds of which are to be covered into the Treasury, and may, without any breach of faith, be devoted by Congress to any purpose whatever, at its discretion. The maxim, *Noscitur à sociis*, applies.

3. The authority to sell or lease marine hospitals is expressly given by section 4806 of the Revised Statutes; but without this it might be raised by implication from section 3618. This section refers to the "sale or leasing of marine hospitals," and it is provided in section 3692 that the proceeds of the sales and leases shall "revert to that appropriation out of which they were originally expended." The power to sell un-serviceable marine-hospital chattel property is not expressly given by statute, but it nevertheless arises from the authority given to the Secretary of the Treasury and the supervising surgeon to supervise all matters connected with the Marine Hospital Service (Rev. Stat., 4802), or, even without this, as an incident of the duty to conduct the hospital service in a proper manner. (*United States v. Macdaniel*, 7 Pet., 14.)

The statute declares that the whole hospital fund "shall be employed under the direction of the Secretary of the Treasury," and by a "permanent specific appropriation" all moneys accruing to the fund are "appropriated for the expenses of the Marine Hospital Service." (Rev. Stat., 3689, 4803.) Here, then, is a specific power over a specific subject, and a special statutory direction in respect of this subject. Such direction must therefore be construed as constituting an exception to the general words in sections 3617 and 3618 of the Revised Statutes. It is a recognized principle of construction that "where," as in this case, "two statutes relate to the same thing," *e. g.*, public moneys, "and one is more comprehensive than the other, there will be an effort

to give to one some operation not embraced in the other, so that each may, if possible, have some effect, that the legislation may not appear to have been vain and useless." (Sedgwick, Stat. and Const. Law, 211; N. L. & B. Inst. v. Com., 14 B. Monroe, 266; 14 Op. Att. Gen., 577; Dodge v. Gridley, 10 Ohio, 176; 1 Greenl. Ev., 301; Doe v. Galloway, 5 B. & Ad., 43, 51; Dist. Land Office case, 2 Lawrence, Compt. Dec., 415.)

Similarly, when there is a general authority, and a separate particular authority, the latter is excepted from, and is not controlled by, the former. (1 Greenl. Ev., 301; Doe d. Smith v. Galloway, 5 B. & Ad., 51.) "A thing given in particular shall not be taken away by general words." (Dwarris, Stats., 2d ed., 513, 668; Stauder v. University, W. Jones, 26; McFarland v. State Bank, 4 Pike, 410; Felt v. Feelt, 19 Wisc., 193; State v. Stoll, 17 Wall., 425; Movius v. Arthur, 95 U. S., 144; Arthur v. Lahey, 96 U. S., 113; Sedgwick, Stat. and Const. L., 2d ed., 360; Pretty v. Solly, 26 Beav., 603; Zachary v. Chambers, 1 Oregon, 321; Fowler's case, 3 Court Claims, 43; Homer v. The Collector, 1 Wall., 486; Reiche v. Smythe, 13 Wall., 162; Smythe v. Fiske, 23 Wall., 374; Bishop's Stat. Crimes, 126; Brown v. Com., 9 Harris, Pa., 43; Haywood v. May, 12 Ga., 404; Cowley v. Calhoun, 2 W. Va., 416; Beridon v. Barvin, 13 La. An., 458; M. & Ohio R. R. v. State, 29 Ala., 573; Ellis v. Batts, 26 Texas, 703; State v. Macon, 41 Mo., 453; Lake v. State, 5 Fla., 194; Ottawa v. La Salle, 12 Ills., 339; Pearce v. Bank, 33 Alabama, 673; State v. Bilansky, 3 Minn., 246.) Hence, it has, on the same principle, been held by Mr. Justice Field, sitting in the ninth judicial circuit, in a case where a party was indicted for acts which constituted treason as defined in the Constitution and by section 1 of the act of April 30, 1790 (1 Stats., 112), that as such acts came within the special statutory definition of the crime of rebellion (act of July 17, 1862, sec. 2), the party could be convicted of the latter crime only.

The power of sale is ample, upon the principle that a general authority given is "always construed to include all the necessary and usual means of executing it with effect." (Story, Agency, sec. 58.) Congress evidently intended the marine hospitals to be managed according to the necessities of the service and on business principles. Sales of the unserviceable or surplus hospital property are obviously necessary to an economical administration of the hospital funds; they are, therefore, to be made in such manner as the Secretary of the Treasury may direct. As the whole fund is specifically appropriated for the hospital service, and as sales of unnecessary or unserviceable marine-hospital property or supplies are necessarily incident to the proper performance of the hospital service, the expenses of such sales can be paid from the proceeds thereof or from any part of the hospital fund, because the whole expense of the hospital service is to be paid from this fund. The fact that the realty of marine hospitals is mentioned in section 3618 of the Revised Statutes, which requires *all proceeds* of sales to be covered into the Treasury, does not, in respect of sales of such property, affect the

question of payment of expenses of sale from the proceeds. For the Secretary of the Treasury has complete power in the matter, and it is immaterial whether the gross or net proceeds are paid into the Treasury, for in case the gross proceeds are so paid, the expenses of sale having been incurred for the benefit of the hospital fund, they are payable from that fund.

The expenditures made for the whole hospital service are to undergo the ordeal of the auditing and accounting system of the Treasury Department. (Rev. Stat., 236, 317; 19 Stat., 249; act February 27, 1877.) The general accounts of this service have always been thus audited and settled. There is nothing in the law or in public policy to except from such settlement any reasonable or necessary expenses connected with the administration of the marine-hospital fund.

The maintenance of a hospital carries with it the authority to employ its grounds for useful purposes, and to dispose of surplus products; therefore, surplus live stock, vegetables, and forage raised by employés on the hospital grounds are to be disposed of and accounted for in the same manner as the unserviceable property already mentioned. The broad powers given to the Secretary extend to all government property in or pertaining to the marine-hospital establishment. The produce of the realty is but an incident of the principal property from which it is derived, and it must, therefore, be devoted to hospital purposes. *Res accessoria sequitur rem principalem.* The whole purpose of the marine-hospital system, since its establishment by the act of July 16, 1798, has been to maintain a fund for the benefit of sick and disabled American seamen. It would require clear language in a statute to take any part of the property so long devoted to this humane and patriotic purpose and make it a source of revenue to be covered into the national Treasury for general purposes. No statute requires this. All descriptions of marine-hospital property come from a common source, all are alike devoted by law to a special and most worthy purpose, and no statute shows any intention to defeat this purpose.

Former opinions upon the questions submitted have not been overlooked. On December 6, 1878, First Comptroller Porter advised the Secretary of the Treasury that old furniture, ambulances, animals, and building materials connected with the Marine Hospital Service could not be exchanged in procuring new articles. He relied for this ruling on sections 3618 and 3672 of the Revised Statutes, and on an opinion by Attorney-General Devens that old printing-presses in the Bureau of Engraving and Printing could not be exchanged for new, but should be sold and the proceeds covered into the Treasury (15 Op., 322), and also on the opinion of May 13, 1872, by Comptroller Tayler, (*ante*, p. 46, 47.) But it has been shown that the general words of sections 3617 and 3618 of the Revised Statutes do not apply to marine-hospital property. Attorney-General Devens did not express any opinion in respect of this class of public property. And as the "instructions" of Secretary Boutwell (*ante*, 47), in which he promulgated the opinion of Comptroller Tayler, specially

excepted the proceeds of sales of such property "as pertain to marine hospitals," it may be implied that Comptroller Tayler concurred with the Secretary in making the exception.

In respect to the question as to exchange of unnecessary or unserviceable public property for other necessary supplies, it may be assumed that, as the statutes contemplated that such property shall be sold, and as they make express provisions for the payment of the proceeds into the Treasury, there is no express authority to make such exchange in any case except that given in section 86 of the Revised Statutes to exchange books for the Library of Congress. The authority given to the Secretary of the Treasury in respect of the management of the marine-hospital fund is discretionary. He has full power to dispose of any of the property pertaining to marine hospitals to the best advantage of the hospital service, and he may therefore prescribe regulations under which exchanges of unserviceable or surplus supplies may be made.

With the exceptions stated, it does not seem to be lawful to make any disposition of government property, when it is no longer needed or fit for the public service, other than by sale and payment of proceeds into the Treasury.

The act entitled "An act to regulate the award of, and compensation for, public advertising in the District of Columbia," approved January 21, 1881 (21 Stats., 317), has no application to the sales of any property of marine hospitals, or of other property sold by order of heads of Departments, except in the case of a sale of a marine hospital. (Rev. Stat., 4806.) No statute requires an advertisement in the public newspapers of such sales as have herein been mentioned. The mode of sale is left to the discretion of the heads of departments, respectively. (15 Op. Att. Gen., 323.)

The result is :

1. As a general rule the gross proceeds of sales of old material, condemned stores, supplies, and other unserviceable or unnecessary public property must be "deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of government property,'" and "not be withdrawn or applied, except in consequence of a subsequent appropriation made by law." (Rev. Stats., 3618.)

2. In respect of the *fund* to which such proceeds are to be covered into the Treasury, and to the *prohibition against expenditure* without subsequent appropriation, there are but six exceptions, and these are specifically made by section 3618 of the Revised Statutes. These six classes of proceeds are, pursuant to section 3692, to be covered into the Treasury and carried to the credit of the appropriation out of which the articles sold were originally purchased. Such proceeds, except in the cases hereinafter stated, may, without subsequent appropriation, be expended for the objects for which the original appropriations were respectively made.

3. The *gross* proceeds of all sales of government property, except of marine-hospital property and of certain ordnance stores sold under

the act of June 22, 1874 (18 Stats., 200), must be covered into the Treasury; hence no deduction can be made therefrom on account of expenses of sales. Such expenses are proper charges upon the appropriation for the service to which the property sold appertained; and if there be none, then they may be paid from the contingent fund appropriated for such service.

4. The provision in section 3692 of the Revised Statutes, which authorizes the proceeds (1) of sales of revenue cutters; (2) of sales of commissary stores to the officers and enlisted men of the Army; (3) of sales of other materials, stores, or supplies to officers and soldiers of the Army; (4) of sales of condemned clothing of the Navy; and (5) of materials, stores, or supplies to any exploring or surveying expedition authorized by law, to be carried to the appropriation out of which the articles sold were originally purchased, and to be applied to the purpose for which that appropriation was made, is modified by section 5 of the act of June 20, 1874 (18 Stats., 110), to the extent that if the property sold was not originally purchased from a "permanent specific appropriation" or other appropriation named in the provision of the latter section, and if at the time of the sale the appropriation from which it was purchased has "remained on the books of the Treasury for two fiscal years," then the proceeds are not to be carried to the credit of such appropriation; but, on the contrary, they are "to be carried to the surplus fund," and are not to be expended without subsequent appropriation by law.

5. The expenses of sales of marine-hospital real property or of condemned stores, supplies, or other unnecessary or unserviceable property pertaining to the marine-hospital service, and other proper expenses incident thereto, may be paid from the proceeds of sale. In such case the net proceeds only are required to be covered into the Treasury.

6. The proceeds of sales of surplus live stock, vegetables, forage, and other agricultural products raised on the ground of marine hospitals accrue to the hospital fund, and they are to be disposed of in the same manner as the proceeds of sales of other hospital property.

7. The proceeds of sales of marine-hospital property of all descriptions and of leases of marine-hospital realty, when covered into the Treasury are to be carried to the credit of the marine-hospital fund; and they may in all cases be expended for the hospital service without subsequent appropriation or regard to limitation of time.

8. Proceeds of sales of "military stores and other Army supplies regularly condemned" fall under the general rule; hence so much of paragraph 1625 of the Army Regulations of 1881 as directs the payment of expenses of such sales from the proceeds is in conflict with law, and void.

9. There is but one class of such sales to which the direction contained in said paragraph 1625 can apply in respect of paying expenses from the proceeds, namely: When any sale is made of "obsolete and unservice-

able ammunition and leaden balls," &c., which were stored in the various arsenals of the United States on July 22, 1874; "the net proceeds of such sale, after paying all costs and expenses of breaking up and preparing said ammunition for sale, and all the necessary expenses of such sale, including the cost of transportation to the place of sale," are "to be covered into the Treasury of the United States," as "miscellaneous receipts, on account of 'proceeds of government property.'" (Act of July 22, 1874, 18 Stats., 200; Rev. Stats., 3617; Army Regulations, 1881, par. 1623.) An implied exception in respect of paying the expenses of such sales from proceeds is contained in the act of March 3, 1875 (18 Stats., 388). The directions in paragraph 1623 of said Army Regulations are applicable in respect of such sales, and are valid, since they accord with the statutory provisions.

10. In all cases the accounts of the expenses of sale are to be audited and settled by the proper accounting officers of the Treasury.

11. The practice in the Department of the Interior of deducting from the proceeds of annual sales of "old material and condemned office property," auctioneers' commissions and other expenses of sale, is in conflict with the provisions of sections 3617 and 3618 of the Revised Statutes, which require the gross proceeds of sales of such property to be "deposited and covered into the Treasury as miscellaneous receipts, on account of 'proceeds of government property.'"

12. The act of January 21, 1881 (21 Stats., 317), regulating public advertising in the District of Columbia, has no application to sales of any of the classes of property herein mentioned. The advertising of such sales is a matter within the discretion of the head of the department to which the property pertains, except in the case of a sale of a marine hospital. In the latter case there must be "due notice in the public newspapers." (Rev. Stats., 4806; 15 Op. Att. Gen., 322.)

13. Unless an officer or agent of the government be authorized by statute to retain for his own use or for some other public use, a part of any moneys received by him "for the use of the United States" or by virtue of his authority as an officer or agent of the United States, the gross amount of such moneys must, under the provisions of sections 3617 and 3618 of the Revised Statutes, be paid into the Treasury without any abatement or reduction whatever. For example, section 4381 of the Revised Statutes, as amended by the act of February 27, 1877 (19 Stats., 251), provides that certain fees collected by officers of the customs shall be "equally divided monthly" between them; and the joint resolution of July 20, 1868, No. 61, authorized expenses of sales of damaged ordnance stores to be deducted from the proceeds of the sales, and required the net proceeds only to be deposited in the Treasury. See above act of June 22, 1874. (18 Stats., 200; 15 Op. Att. Gen., 44.)

TREASURY DEPARTMENT,

FIRST COMPTROLLER'S OFFICE,

January 20, 1882.

IN THE MATTER OF THE EXCHANGE OR SALE OF PROPERTY BY THE
SUPERINTENDENT OF THE GOVERNMENT HOSPITAL FOR THE INSANE.—
ST. ELIZABETH'S HOSPITAL CASE.

1. In the purchase of supplies for the government hospital for the insane an arrangement that casks, sacks, &c., necessary for the delivery and use during the consumption of such supplies may be returned to the vendor and the value thereof deducted is authorized.
2. So an arrangement with a vendor that portions of articles which are not required for the hospital, but which at the time of sale cannot be conveniently severed, may be returned and the value deducted, is authorized.
3. The same arrangement may be made when the quantity of such portions cannot be ascertained until the principal articles are partially or wholly consumed.
4. But in the absence of previous arrangement of this character no such return and credit can be made.
5. The law requires articles not needed for the use of the hospital to be sold and the gross proceeds to be covered into the Treasury as miscellaneous receipts on account of proceeds of government property. (Rev. Stats., 3618.)

March 29, 1881, the Superintendent of the Government Hospital for the Insane addressed a letter to the First Comptroller, in which he says:

"In making up the account of this hospital it has been the uniform custom of the disbursing officers to allow certain credits on vouchers for supplies, as for example:

"1. On the bill for meats the United States has been debited by the vendor with the meat at so much per pound, including the tallow, and credited by said vendor with the tallow returned.

"2. In the purchase of coffee the extra bag for shipping is usually returned and credited.

"3. In the purchase of soap the amount paid is reduced by a credit of grease and drippings.

"4. The price of new gas retorts is reduced by the credit of so much old iron from those burned out, &c.

"These credits simply reduce the amount of the vouchers paid, and do not represent any receipt of cash by the hospital."

And he requests the decision of the Comptroller on the question whether this can be considered as legal.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The practice adopted in the purchase of meats and coffee is authorized. It is merely a mode of buying and paying in the one case for the meat purchased without the tallow, and in the other of buying and paying for the coffee without the bag for shipping. There is in no proper sense within the meaning of section 3618 of the Revised Statutes a "sale" by the hospital authorities of the tallow or the bag. It may frequently happen that it will be necessary to buy provisions in casks and

sacks, and to contract for the use of such casks and sacks for convenience in delivery, or during the time the provisions are being consumed. In the management of the hospital it would be clearly proper to hire, for an agreed price or upon a quantum meruit, the use of casks and sacks for such purposes from any person owning them, and for the requisite time. This may be done as well from the vendor of provisions in such casks as from other parties. In such case the government becomes a bailee of the articles so hired. This is simply a case of *locatio rei* in the law of bailment. (2 Pars. Cont., 121.) If, when a sale of provisions in casks is made, the agreed price includes the use of the cask, and it be a part of the arrangement that the purchaser shall return the cask and have credit for it at an agreed price or upon a valuation to be ascertained, this would still seem to be a *locatio rei*, although the transaction be called a sale. It is to be judged by its legal effect and not by what it is called. But if the transaction be made in effect a sale, with an agreement for a resale to the original vendor, or if, as in the case of beef with the intermixed tallow, actually sold with a right at the option of the purchaser depending on future contingencies in his election to sell all or a part of the tallow back to the original vendor upon a consideration to be credited in each case on the original contract price of the gross articles sold, there is in neither case a "sale" within section 3618 of the Revised Statutes. (See Act February 27, 1877, 19 Stat., 249; Rev. Stat., 3672.) The question is important, because if it be a sale within that section, the gross proceeds must be "covered into the Treasury," and cannot be used by the hospital, and the appropriation for the hospital will be chargeable with the amount as an expenditure; otherwise not. That it is not a sale within section 3618 is clear. The title may, possibly, in the cases stated have so far passed to the government as that a loss or destruction of the property, even without fault of the hospital, would fall upon the United States, especially in the case where the right of resale is optional with the purchasing officer.

But in the cases stated the right of resale constitutes a part of the original contract of purchase. The effect is to impose an ultimate liability on the hospital appropriation of only so much as it used. This defeats no purpose of the appropriation, but really executes its purpose, and does justice to the government. By every reasonable intendment section 3618 was not designed to defeat such arrangement. The purpose of the section is to provide for the sale of property purchased for the use of the United States which has become unserviceable or is no longer needed, the title to which had absolutely passed to the United States, either with no contingent conditions by which it might be reinvested in the original vendor, or after they had ceased. When the original contract of sale reserves a right in the vendee to resell to the vendor, the exercise of this right simply restores the title as it was. When the right to exercise the option originates at the time and as part of the original purchase, and so continues and is finally exercised, it would

seem to relate back to the origin of the transaction. So long as the option exists to return to the original vendor the articles sold if it be found they are not needed, the ultimate title is contingent. (3 Pars. Cont., 35, 36.) At all events, section 3618 in authorizing "sales" uses the word in the sense of making an absolute title to property owned by the government, and not subject to contingent conditions legally made in the interest of the public and in the proper exercise of discretionary powers.

The application of "grease and drippings" and of "old iron from those gas retorts burned out" is not authorized. (15 Op., 322.) They are covered by that clause of section 3618 of the Revised Statutes which requires "all proceeds of sales of old material, condemned stores, supplies, or other public property of any kind" to "be deposited and covered into the Treasury as miscellaneous receipts." The authority to make sale of such material arises from this statute in connection with the power to carry on the "general operations" of the hospital. (Rev. Stat., 4841.) The articles mentioned cannot be exempted from liability to sale by the small amount in value thereof, or the inconvenience which may be supposed to result. A construction which would sanction the use which has been made of the old iron of the gas retorts would sanction a similar use of all old materials. It makes no difference that the proceeds go into new retorts. The objection to it is that it is a use of public property not authorized by law. If such use can be made, old horses, cattle, materials and supplies of all kinds and of large value can be so used. The argument *ab inconvenienti* sometimes is entitled to weight, but it cannot repeal a statute or supply the place of one. And it is not perceived that the inconvenience can really exist. The management of the hospital requires the purchase, care, and sometimes sale of many small objects, which can be attended to by competent and proper agencies.

There is nothing in the statute applicable to the hospital which can possibly be construed to except the articles mentioned from the operation of section 3618 of the Revised Statutes. The superintendent is the "chief executive officer," but the proceeds of sales of old or useless property are not by law dedicated to the uses of the hospital, and thus, or in any manner, excepted from the general liability to go into the Treasury subject to general appropriations.

The superintendent will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, January 21, 1882.

IN THE MATTER OF THE POWER OF DISBURSING OFFICERS AND AGENTS
TO DELEGATE AUTHORITY TO SIGN DRAFTS AND CHECKS.—AGENCY-
DELEGATION CASE.

1. It is a general rule that whatever a party, *sui juris*, may do of himself, he may do by another. *Qui facit per alium, per seipsum facere videtur*. But many officers and persons acting under public authority are, in contemplation of law, appointed with a view to the exercise of individual personal judgment and skill; and as to them the maxim, *delegatus non potest delegare*, applies.
2. When a statute delegates an authority to a particular person or to a particular class of persons, and it is evident that a personal trust or confidence is reposed in such person or persons, and especially when the exercise and application of the power is made subject to his or their discretion or judgment, the authority is purely personal, and cannot be delegated to another, unless there be a special power of substitution.
3. The general rule is, that where a statute gives authority to one person expressly, all others are excluded. This rule is founded on the maxim, *expressio unius est exclusio alterius*, and on the principle that a grant of a special power is to be construed strictly.
4. The statutes frequently impose duties upon the heads of executive departments and other officers which, from their nature, require the employment of agents for their performance. In such cases, although there may be no express authority for such employment, the head of the proper department is, by necessary implication, clothed with power to employ the requisite agents, and the appropriate means to carry into effect the required end.
5. In view of the many statutory provisions which prescribe the duties of officers intrusted with the collection, safe-keeping, and disbursement of the public revenues, it is obvious that it would be unlawful to intrust public moneys to any officers or agents other than those who are by law, or pursuant to law, specially charged with duties as "*fiscal agents of the government*"; and it is also obvious that such duties involve the performance of a trust.
6. In respect of that class of fiscal agents whose duty it is to disburse public moneys, section 3648 of the Revised Statutes is explicit that to them only, "under the special direction of the President," shall any advances of public money be made from the Treasury. In such case the amounts to be advanced are limited to such sums "as may be necessary to the faithful and prompt discharge of their [the disbursing officers'] respective duties, and to the fulfillment of the public engagements."
7. No words could more clearly indicate a special trust than those used in this section. This special trust involves two duties—(1) the payment of such debts of the government as the fiscal agent is especially authorized to pay from the moneys advanced to him from the Treasury under the special direction of the President; and (2) the rendering of true and distinct accounts of such payments, and the payment into the Treasury of the balances which may be found due to the United States on such accounts.
8. To limit as far as possible the trust reposed in disbursing officers, section 3620 of the Revised Statutes forbids fiscal agents of the government, when they are not public depositaries, to keep in their own possession or custody moneys advanced to them for disbursement.
9. Each disbursing officer or agent must, by that section, deposit the "public money intrusted to him for disbursement" with the Treasurer, or one of the assistant treasurers, of the United States, or, in places where there is no treasurer or assistant treasurer, with such other public depositary or in such manner as the Secretary of the Treasury may designate in writing.

10. Section 3620 prohibits the disbursing officers or agents who are not depositaries from paying out any public moneys themselves. The moneys advanced to them and deposited with the depositaries are to be paid out by the depositaries, on drafts or checks drawn by the disbursing officer or agent; and the drafts or checks are to be drawn "only in favor of the person to whom payment is [to be] made."
11. Although in practice it has been found impossible in a great variety of cases to comply with that part of the law which requires payment by checks drawn on depositaries in the form prescribed, and although the attention of Congress has been repeatedly called to this impossibility, no change has been made in the law in respect of this requirement. Therefore, so far as the question submitted is concerned, this provision of law must be considered as in force.
12. The question discussed—To what extent may the Secretary of the Treasury, or the First Comptroller, delegate the power of signing, or countersigning, warrants drawn on the Treasurer for the advance or payment of public moneys? *Held*: That, in the absence of statutory authority, this power cannot be delegated. Section 246 of the Revised Statutes authorizes the Secretary, in making appointments under his hand and official seal, to "delegate to one of the Assistant Secretaries of the Treasury authority to sign in his stead" two classes of Treasury warrants therein named; but no statute authorizes the Comptroller to delegate his power of countersigning Treasury warrants.
13. As the Secretary and Comptroller cannot, without statutory authority, delegate their power to sign instruments directing advances or payments of public moneys to be made, it would appear to follow by analogy that no other fiscal officer of the government can, in the absence of statutory authority, delegate the special trust reposed in him of signing drafts or checks drawn in favor of public creditors.
14. The office of Deputy First Comptroller was created by section 2 of the act entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and seventy-six, and for other purposes," approved March 3, 1875. (18 Stats., 371, 396.)
15. This act is construed as having abolished the office of chief clerk in the accounting and other specially named bureaus of the Treasury Department. (15 Op. Att. Gen., 3.) It devolved upon the deputies therein provided for the duties which were previously performed by chief clerks, and imposed upon them no other official duties.
16. The chief clerk in the office of the First Comptroller had not, in the proper sense of the term, any administrative powers; he was not an officer who was intrusted with the duty of construing or executing laws affecting public affairs; he had not the management, conduct, direction, regulation, or execution of any matters coming before the office, as an accounting office.
17. He was not the deputy of the Comptroller, for he could perform no administrative function upon claims or accounts or other official matters coming before the bureau, which the subordinate clerks, to whom such matters are usually referred for examination, could not have as fully performed.
18. Congress must be presumed to have meant something by the use of the word "deputy" in the act which reorganized the Treasury Department and abolished the office of chief clerk in the several bureaus therein named. The most reasonable construction that can be given to the word is,—that Congress intended by its use to provide deputies to act for the First Comptroller and the other accounting officers named in the act of March 3, 1875, in such ministerial duties as might properly be delegated to a deputy for performance.
19. The question as to the extent or limitation of the powers of delegation possessed by a public officer at common law examined, in order to ascertain the extent to which the accounting officers of the Treasury Department may delegate to the deputies provided for them by statute the power of signing and certifying warrants, accounts, and other public documents. *Held*: That this power cannot be delegated, except in certain cases expressly authorized by statute.

20. The accounting officers of the Treasury act as judges of law and fact on claims and accounts, and other matters coming before them. They are to that extent judicial officers and fall under the ordinary rule, that "an individual clothed with judicial functions cannot delegate the discharge of these functions to another, unless he be expressly empowered to do so under specified circumstances." (Broom's Leg. Max., 840.) Similarly, when the duties of an office imply special learning, or skill and integrity, on the part of the incumbent as considerations for the grant of the office, the duties thereof cannot, without consent of the grantor, be delegated. Hence, although a *public officer* may generally delegate a *ministerial* duty to a deputy, such officer cannot delegate to a deputy or other person the performance of a quasi-judicial duty, or such a ministerial duty as the incumbent should, in contemplation of the personal trust reposed in him, perform himself.
21. The signing and countersigning of a Treasury warrant are acts performed in the discretionary execution of a high public trust; and while the recording of the warrant may be regarded as a merely ministerial function, nevertheless that duty cannot be delegated by the Register of the Treasury to his assistant, who is by law empowered to perform "such duties as may be devolved on him by the Register" (Rev. Stats., 315), because the law requires the Register himself to certify all warrants, bonds, and drafts which are to be recorded. (*Ib.* 305, 307, 315.)
22. If relief for the accounting officers, beyond that for *routine ministerial acts*, was contemplated in framing the act providing for deputies in their respective offices, Congress has, from insufficiency of words, failed to grant it; for, in respect of any other official acts, the accounting deputies are not, either in fact or in the legal sense of the word, deputies at all.
23. This is certainly true as to the deputy in the office of the First Comptroller, for the Comptroller's office is of such a decidedly quasi-judicial character that if there be any ministerial functions to be performed in it they are so intimately connected with judicial or discretionary ones that they cannot well be severed.
24. Upon the principles stated, and from the provisions of law cited, it may be confidently asserted that public policy—so far as it can be discerned in precedents, practice, and the statutes—forbids any public officer having fiscal duties to perform to delegate any part of those duties to another person who is not by law authorized to perform them.
25. Hence it must be held that where a public officer or agent is by law or regulation empowered to draw a draft or issue a check for the payment of public money, such draft or check must always be signed by the agent or officer himself. It has never, in the business of banking, been considered that the cashier of a bank could delegate to any officer of the bank, or clerk, or other person, his power to draw a draft or sign a check. The act of signing such paper is the execution of a trust, and it cannot be delegated.
26. The act of signing a disbursing officer's check is likewise an execution of a trust—a public trust; and hence the answer to the question submitted is,—that a disbursing officer or disbursing agent cannot confer lawful authority on his clerk, or on any other person, to sign checks or drafts in his own name or in the name of such officer or agent, upon any public funds deposited to his credit with the Treasurer of the United States or with an assistant treasurer or designated depository of public moneys.

The question is submitted to the First Comptroller for his opinion: Can ordinary disbursing officers [Rev. Stats., 56–58, 62, 176, 255, 496, 1153, 1382, 1550, 1563, 1765, 1951, 3144, 3646, 3648, 3658, 3677, 4839, &c.] and agents [Rev. Stats., 3614, 3658, 1550; *Eveleth's Case*, 2 Lawrence, Comptroller's Decisions, 20] execute a valid power of attorney author-

izing a clerk or other person "to sign checks [Rev. Stats., 306, 307, 308, 3620, 3645, 4765, 5413; act February 27, 1877, 19 Stats., 249] or drafts in his own name, or that of such officer or agent, upon any funds deposited, or which shall hereafter be deposited with the Treasurer of the United States to" [Rev. Stats., 3620, 3621, 3648, 3658; act June 23, 1874; 18 Stats., 216] the credit of such officer or agent?

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

It is a general rule that whatever a party, *sui juris*, may do of himself, he may do by another. *Qui facit per alium, per seipsum facere videtur*. (Story, Agency, sec. 2.) But many officers and persons acting under public authority are, in contemplation of law, appointed with a view to the exercise of individual personal judgment and skill; and as to them the maxim, *delegatus non potest delegare*, applies. (Broom, Leg. Max., 839, 840; *Miles v. Bough*, 3 Q. B., 845 (43 E. C. L. R); *The California*, 1 Sawyer, 596; 7 Op. Att. Gen., 594; *Burroughs' Case*, 4 Court Cl., 555.)

When a statute delegates an authority to a particular person or to a particular class of persons, and it is evident that a personal trust or confidence is reposed in such person or persons, and especially when the exercise and application of the power is made subject to his or their discretion or judgment, the authority is purely personal, and cannot be delegated to another, unless there be a special power of substitution. Such is the rule in relation to powers created by deed or will; *a fortiori* it is so when the authority is conferred by an act of the legislature. (Smith, Stat. and Const. L., sec. 581; *Lyon v. Jerome*, 26 Wend., 485; *Shankland v. Corporation of Washington*, 5 Pet., 390.) The general rule is, that where a statute gives authority to one person expressly, all others are excluded. (Smith, Stat. and Const. L., sec. 581.) This rule is founded on the maxim, *expressio unius est exclusio alterius*, and on the principle that a grant of a special power is to be construed strictly.

The principles stated are not, however, of universal application. Statutes frequently impose duties upon the heads of executive departments and other officers which, from their nature, require the employment of agents for their performance. In such cases, although there may be no express authority for such employment, the head of the proper department is, by necessary implication, clothed with power to employ the requisite agents, and the appropriate means to carry into effect the required end. (*Gratiot v. United States*, 15 Pet., 336; *United States v. MacDaniel*, 7 Pet., 1; *United States v. Ripley*, 7 Pet., 18; *United States v. Fillebrown*, 7 Pet., 28; *Williams v. United States*, 1 How., 290.) This implied power is recognized, and in some cases limited, by the act of August 5, 1882 (22 Stats., 255, sec. 4).

By the act of March 3, 1857 (11 Stats., 249), amendatory of "An act to provide for the better organization of the Treasury, and for the collec-

tion, safe-keeping, transfer, and disbursement of the public revenue," it was provided " * * * that each and every disbursing officer or agent of the United States, having any money of the United States intrusted to him for disbursement, shall be and he is hereby required to deposit the same with the Treasurer of the United States, or with some one of the assistant treasurers or public depositaries, and draw for the same *only in favor of the persons to whom payment is to be made* in pursuance of law and instructions ; except when payments are to be made in sums under twenty dollars, in which cases such disbursing agent may check in his own name, stating that it is to pay small claims."

The Secretary of the Treasury in his Report on the State of the Finances for the year ended June 30, 1857, pages 24 and 25, said:

"The object of this provision of law was to protect the government from the improper use of the public funds in the hands of disbursing officers. * * * An enforcement of its provisions according to its letter was impracticable. It would have required considerable increase of the clerical force of different offices, for which no provision had been made by Congress, and in some of the departments a compliance with its requirements was impossible. Payments by the disbursing officers of the Army and Navy, as well as payments by a portion of such officers in the Interior Department, could not be made in the mode pointed out. Pursers in the Navy settling with the officers and crew of a vessel in foreign ports ; paymasters in the Army, at remote points from any public depositary ; disbursing agents charged with the payment of Indian annuities, could not discharge their duties if a literal compliance with this law had been required. Regarding the object of the law as wise and proper, and feeling bound to enforce it to the utmost extent in my power, I caused circulars Nos. 2 and 3, appended to this report, to be issued to the various public depositaries and disbursing agents of this department, by which it will be seen that the object of the law has been carried out, and in the mode prescribed, as far as it was possible to do so. It is believed that the regulations thus adopted will effectually secure the object which Congress had in view in the passage of the act of March 3, 1857, and I would recommend that the law be so amended as to conform to these regulations."*

The same Secretary again called the attention of Congress to "the impossibility of executing the law as it now stands on the statute book." (See Report on the Finances, 1857-'58, p. 17.)

In his Report on the Finances dated December 2, 1878, the Secretary of the Treasury said :

"The enforcement of this provision [of the act of March 3, 1857], according to its letter, was found impracticable, and the attention of Congress was called to it in the annual reports of the Secretary for 1857 and 1858, with a recommendation for its modification. .

"No action in the matter appears to have been taken by Congress

* For the regulations now in force, see Circular, page 86, *post*.

until the act of June 14, 1866, reproduced as section 3620 Revised Statutes, was passed. This appeared to supersede the act of 1857, in removing the restrictions as to the method in which the money was to be drawn; but by an act approved February 27, 1877, section 3620 has been amended by requiring the checks to be drawn only in favor of the persons to whom payments are to be made.

“The object which the law evidently seeks to accomplish meets the entire approval of the department, but to carry its provisions into effect would require paymasters in the Army to draw their checks in favor of the soldiers to be paid, by name, and paymasters on naval vessels, even during absences for years from the United States, to pay the officers and men only by drawing checks in their favor, on depositaries in the United States.

“The same embarrassment extends to all public disbursements, and the attention of Congress is called to the matter, with the recommendation that the section be so amended that disbursements may be made under regulations to be prescribed by the Secretary of the Treasury.”

The act of June 14, 1866 (14 Stats., 64, sec. 1), doubtless, in part grew out of the failure of the depository bank in Washington, and the loss on the government deposits therein. (Hobbs's Case, 17 C. Cls., 189; s. c., 2 Lawrence, Compt. Dec., 553.)

The provision cited from the act of 1857 was, in substance, re-enacted June 23, 1874 (18 Stats., 204), as to disbursements made for “charitable, industrial, or other associations;” and it was made general by the act of February 27, 1877 (19 Stats., 249). Under the latter act, as carried into section 3620 of the Revised Statutes (2d ed., 1878), disbursing officers can draw checks *only in favor of the person to whom payment is made in pursuance of law.**

There are no lawful transactions with the public moneys of the United States which do not come under one or other of the following general heads, viz; collection, safe-keeping, transfer, or disbursements. Under the provisions of the act entitled “An act to provide for the better organization of the Treasury, and for the collection, safe-keeping, transfer, and disbursement of the public revenue,” approved August 6, 1846 (9 Stats., 59), the officers whose duties involve one or other of these transactions are called “fiscal agents of the government.” (Ib., sec. 6; Rev. Stats., 3639.) The fiscal duties of these officers are prescribed by law, or by “regulation of the Treasury Department made in conformity to law”. Each one of the officers named in the sixth section of the act is required by law to give a bond for the faithful performance of his official duties (1 Lawrence, Compt. Dec., Appx., ch. xv.); and in addition to this, these fiscal agents are under special criminal as well as civil liabilities for failure, neglect, or violation of duty. In view of the many statutory provisions which hedge the above-named transactions with

*As to disbursement for the construction of public buildings, see circular of March 25, 1878, appended to Huidekoper's Case, 2 Lawrence, Comptroller's Decisions, 367.

the public revenues, it is obvious that it would be unlawful to intrust public moneys to any officers or agents other than those who are by law, or pursuant to law (Rev. Stats., 3614), specially charged with duties as "fiscal agents of the government;" and it is also obvious that such duties involve the performance of a trust. In respect of that class of fiscal agents whose duty it is to disburse public moneys, section 3648 of the Revised Statutes is explicit that to them only, "under the special direction of the President," shall any advances of public money be made from the Treasury. Even in these cases the amounts to be advanced are limited to such sums "as may be necessary to the faithful and prompt discharge of their [the disbursing officers'] respective duties, and to the fulfillment of the public engagements." No words could more clearly indicate a special trust than those used in this section. This special trust involves two duties—(1) the payment of such debts of the government as the fiscal agent is especially authorized to pay from the moneys advanced to him from the Treasury under the special direction of the President; and (2) the rendering of true and distinct accounts of such payments, and the payment into the Treasury of the balances which may be found due to the United States on such accounts. (Rev. Stats., 3623, 3624.) To limit as far as possible the trust reposed in disbursing officers, section 3620 of the Revised Statutes forbids fiscal agents, when they are not public depositaries, to keep moneys advanced to them for disbursement in their own possession or custody. Each disbursing officer or agent must, by that section, deposit the "public money *intrusted* to him for disbursement" with the Treasurer, or one of the assistant treasurers, of the United States, or, in places where there is no Treasurer or assistant treasurer, with such other public depository or in such manner as the Secretary of the Treasury may designate in writing. (See circular, *post*, 86.) This section prohibits the disbursing officers or agents who are not depositaries from paying out any public moneys themselves. The moneys advanced to them and deposited with the depositaries are to be paid out by the depositaries, on drafts or checks drawn by the disbursing officer or agent; and the drafts or checks are to be drawn "only in favor of the person to whom payment is [to be] made." Although in practice it has been found impossible in a great variety of cases to comply with that part of the law which requires payment by checks drawn on depositaries in the form prescribed, and although the attention of Congress has been repeatedly called to this impossibility, no change has been made in the law in respect of this requirement. Therefore, so far as the question submitted is concerned, this provision of law must be considered as in force.

In effect, the question submitted is this: Can a disbursing officer or agent delegate his power to sign a check drawn against public money, in a public depository, which has been advanced to such fiscal agent, and been placed in such depository under the special direction of the President, for the special purpose of paying therefrom certain debts

due from the United States to certain creditors thereof? In other words, can the performance of a trust reposed by law in a public officer be delegated?

A negative answer to this question is so obviously the only one which can properly be given, that it would seem to be unnecessary to discuss it. But as the signing of a check may be regarded as a mere ministerial act, and as trustees have, as a general rule, the power to employ all proper and necessary means for the execution of their trusts, it may be proper to enter into an examination of the question,—To what extent may the Secretary of the Treasury, or the First Comptroller, delegate the power of signing, or countersigning, warrants drawn on the Treasury for the advance or payment of public moneys? If these officers cannot delegate their power to sign instruments directing advances or payments of public moneys to be made, it would appear to follow by analogy that no other fiscal officer of the government can, in the absence of statutory authority, delegate the special trust reposed in him of signing drafts or checks drawn in favor of public creditors.

I. The act of March 3, 1849, section 13 (9 Stats., 396), which created the office of Assistant Secretary of the Treasury, prescribed the duties of that officer. He “shall examine all letters, contracts, and warrants prepared for the signature of the Secretary, and shall perform all such other duties in the office of the Secretary of the Treasury, now performed by some of his clerks, as may be devolved on him by the Secretary of the Treasury.” (Rev. Stats., 245.) The act of March 14, 1864, section 3 (13 Stats., 26), which provided for “an additional Assistant Secretary of the Treasury,” prescribed that this officer “shall perform all such duties in the office of the Secretary of the Treasury, *belonging to that department*, as shall be prescribed by the Secretary of the Treasury, or as may be required by law.” (Rev. Stats., 245.) These acts, especially the latter, grant large powers of delegation to the Secretary of the Treasury; but they have never been construed as authorizing a delegation of the power to sign a Treasury warrant. The act “to establish the Treasury Department” (1 Stats., 65) made it the duty of the Secretary to grant, under the limitations therein prescribed, “all warrants for moneys to be issued from the Treasury.” The same act made it the duty of the Comptroller to countersign all warrants “*drawn by the Secretary of the Treasury, which shall be warranted by law;*” and of the Treasurer “to receive and keep the moneys of the United States, and to disburse the same upon warrants *drawn by the Secretary of the Treasury, countersigned by the Comptroller, recorded by the Register, and not otherwise.*” (Rev. Stats., 248, 269, 305, 313.) The act of March 2, 1867 (14 Stats., 439), was passed for the express purpose of relieving the Secretary of the Treasury from the personal duty of signing two large classes of Treasury warrants. It provided that he “shall have power, by an appointment under his hand and official seal, to *delegate* to one of the Assistant Secretaries of the Treasury authority to sign in his stead all warrants for the payment of

money into the public Treasury, and all warrants for the disbursement from the public Treasury of money certified by the proper accounting officers of the Treasury to be due on accounts duly audited and settled by them"; and in order to remove all doubts in respect of the validity of warrants so signed, the act expressly provided that "such warrants so signed shall be in all cases of the same validity as if they had been signed by the Secretary of the Treasury himself." (Rev. Stats., 246, 247.) This act affords strong legislative construction against any delegation of the power to sign, countersign, or record a Treasury warrant, unless there be express statutory authority for so doing. The signing and countersigning of a Treasury warrant are, as has been shown in Chapter XII of the Appendix to 1 Lawrence, Comptroller's Decisions, acts performed in the discretionary execution of a high public trust; and while the recording of the warrant may be regarded as a merely ministerial function, nevertheless that duty cannot be delegated by the Register of the Treasury to his assistant, who is by law empowered to perform "such duties as may be devolved on him by the Register" (Rev. Stats., 315), because the law requires the Register himself to certify all warrants, bonds, and drafts which are to be recorded. (*Ib.*, 305, 307, 315.)

In the year 1824 the President of the United States submitted to Attorney-General Wirt the question,—“Whether, in cases in which the law requires that public documents shall be *signed* by the Secretary of the Treasury, that officer, having been rendered by sickness unable to write his name in the usual manner, may impress his name by the use of a stamp or copperplate instead of pen and ink; and whether instruments so signed are valid in law.” In discussing this question the Attorney-General took up the case of a Treasury warrant granted under the act of September 2, 1789, to establish the Treasury Department. This act, which is incorporated into the Revised Statutes, made it the duty of the Secretary to *grant* the warrant, of the Comptroller to *counter-sign* it, of the Register to *record* it when so granted and countersigned, and *not otherwise*, and of the Treasurer to take receipts for all moneys paid by him, and to indorse receipts for moneys received by him upon warrants *signed by the Secretary of the Treasury*. It also expressly provided that without such “warrant, *so signed*, no acknowledgment for money received into the public Treasury shall be valid.” (Rev. Stats., 248, 269, 305, 313.) In the opinion given (1 Op., 670) there is an implication that the Secretary might adopt as his signature his name signed for him on the warrants, in his presence and at his request, by another person. This view is founded on the principles stated in the opinion: (1) that, “with regard to the signing being done *propria manu* of the person to be affected by it, it has always been decided that this is unnecessary, not only in wills, where the law expressly tolerates the agency of another, but in all other instruments where the law is silent, except as it speaks in the maxim that *qui facit, &c.*”; and (2) that “the word

signing does not * * * necessarily imply, *ex vi termini*, the use of pen and ink, held and guided by the hand of the Secretary himself."

"Upon the whole," says the Attorney-General, "while I admit the force of the presumption that Congress, in requiring these instruments to be *signed* by the Secretary, had in view his autograph executed in the usual mode; and while I admit that this ought always to be preferred when it can be done; yet I am not prepared to say that his *signing* with a stamp or copperplate, instead of a pen, is illegal, or that it leaves the instrument so signed invalid. On the contrary, if he keep the stamp or copperplate in his own possession, and either apply it himself, or cause it to be applied by another in his presence, and by his authority, I am of opinion that the instrument is as valid, in strict law, as if he had written his name with a pen. It might otherwise happen that the public might lose the services of an able officer from a mere temporary disability in his right hand.

"This opinion, however, proceeds upon the postulate that the Secretary has not been so far disabled by disease but that he is capable of seeing what is done, so that one paper cannot be passed upon him for another. For if, unfortunately, he has so far lost his sight that one paper may be passed upon him for another, then, however lamentable it might be, I should hold that the public security required an application of the provisions of the eighth section of the act of the 8th May, 1792, to the case. That section is in the following words: 'That in case of the death, absence from the seat of government, or *sickness* of the Secretary of State, Secretary of the Treasury, or of the Secretary of the War Department, or any officer of either of the said departments, whose appointment is not in the head thereof, *whereby they cannot perform the duties of their said respective offices*, it shall be lawful for the President of the United States, *in case he shall think it necessary*, to authorize any person or persons, at his discretion, to perform the duties of the said respective offices until a successor be appointed, or until such *absence or inability by sickness shall cease*.'

"But while the Secretary so far possesses his vision as to be able to superintend the application of the stamp or copperplate, and prevent imposition in its use—his mental faculties being, in the estimation of the President, competent to the discharge of the duties of his office—I should hold the use of the stamp or copperplate signature, under such superintendence, a legitimate exercise of his power of signing the instruments which are to flow from his authority." (See *Stevens and Wife v. Vancleve*, 4 Wash. C. C., 262, 269; *Smith v. United States*, 5 Pet., 293, 295, 300, 302.)

The Hon. Robert McClellan, while Secretary of the Department of the Interior, asked the opinion of Attorney-General Cushing as to whether the Commissioner of Pensions might lawfully delegate to another the duty of signing land warrants. The case is not strictly in point, for, in the matter of signing land warrants, the Commissioner was himself acting by virtue of a delegated power under the provisions of the acts of 1843 and 1849 (5 Stats., 877; 9 Stats., 395). These acts, the Attorney-General said, enabled the Secretary of the Interior "to delegate to the Commissioner a power of attestation which otherwise must have been exercised by himself, but not to delegate the same to any person save the Commissioner." The opinion given is as follows:

"In a word, the point referred is the whole question of attestation by heads of departments and chiefs of bureaus. Can the attestation of

commissions, Treasury warrants, passports, and the like, be delegated, and any clerk in the departments made a certifying officer in these respects, without authority of Congress? I hesitate to say so. I should not be willing to guaranty indictments for forgery based on such assumption. I advise, therefore, that if the time occupied in signing the bounty-land warrants by the Commissioner has become a serious impediment to the prompt performance of his merely intellectual duties, relief should be obtained from Congress." (7 Op. Att. Gen., 597.)

For a further consideration of this question, see pages 82, 83, and 84, *post*.

. II. The First Comptroller cannot delegate to his deputy the power to countersign a Treasury warrant any more than the Secretary of the Treasury could, prior to March, 2, 1867, delegate to one of his assistants the power to sign a Treasury warrant.

The office of deputy comptroller was created by section 2 of "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and seventy-six, and for other purposes," approved March 3, 1875. (18 Stats., 371, 396.)

This act is construed as having abolished the office of chief clerk in the accounting and other specially named bureaus of the Treasury Department. (15 Op. Att. Gen., 3.) It devolved upon the deputies therein provided for the duties which were previously performed by chief clerks, and names no other official duties. The language of the act in respect of the duties of the deputies is as follows:

"That the duties heretofore prescribed by law and performed by the chief clerk in the several bureaus named, shall hereafter devolve upon, and be performed by, the several deputy comptrollers, deputy auditors, deputy register, and deputy commissioner herein named."

These duties are prescribed in sections 173 and 174 of the Revised Statutes, and are confined to the supervision, under direction of their immediate superiors, of the clerical work of the respective bureaus. There is no law that expressly authorizes the Comptroller's deputy to perform any of the duties pertaining to the office of Comptroller, while the latter is present and performing his duties, other than the sections above referred to; and the duties therein prescribed are, at most, of a ministerial character. The chief clerk in the office of the First Comptroller had not, in the proper sense of the term, any administrative powers; he was not an officer who was intrusted with the duty of construing or executing laws affecting public affairs; he had not the management, conduct, direction, regulation, or execution of any matters coming before the office, as an accounting office. It was never considered that the Comptroller could delegate to him the power to countersign a warrant, or make a certificate of a balance on an account. He was simply a clerk, a "chief clerk," charged with the superintendence of other clerks—he was subordinate in his sphere, and acted under the direction

of the head of his bureau. He was not the deputy of the Comptroller, for he could perform no administrative function upon claims or accounts or other official matters coming before the bureau, which the subordinate clerks, to whom such matters are usually referred for examination, could not have as fully performed. A deputy, in the ordinary meaning of the word, is one who is appointed by, and as the agent or substitute of, an incumbent of an office, to act therein for the incumbent.

When the word "deputy" is used in connection with an executive office, it denotes an assistant who is empowered to act in the principal officer's name, as, for example, a deputy collector, a deputy sheriff, or a deputy marshal. The word deputy is a word of common use. It commonly means an officer or assistant, who is appointed by another officer to act for, and in the name of, his principal, and who derives all of his authority from the person or office for whom, or in which, he acts, and is subject to removal by his principal officer. Evidently, therefore, the word "deputy," when used in connection with the word "comptroller," cannot be construed according to common usage. The First Comptroller cannot appoint a deputy comptroller. The latter is an "officer of the United States," and, under the Constitution, the power to appoint him can be vested only in the President, or in the head of the Treasury Department. The word "deputy" when applied to an officer appointed by the President, is a misnomer when combined in the statute with the word "comptroller," because the office of deputy comptroller is a complete office in itself, and is distinct from that of Comptroller. The deputy does not cease to hold his office on the resignation, removal, or death of the Comptroller. (*Rex v. Corporation of Bedford Level*, 6 East, 356.) The deputy's office is created by statute; his salary and duties are prescribed by law; he is required to qualify as an officer before entering on the duties of his office. He acts by virtue of his office, and not in the character of a deputy within the common law or general meaning of the word. At common law, a deputy acts in the name of his principal officer; but, under the Virginia act of 1867, sec. 7 (Sess. Acts, 849), providing for the appointment of an assistant commissioner of the revenue in certain cases, and authorizing him to discharge "any of the duties of commissioner," it was held,—that the assistant need not act in the name of his principal in performing any of the duties of his office. (*Commonwealth v. Byrne*, 20 Gratt., 165.)

Since words used in a statute are to be interpreted according to their common meaning, in a proper or figurative sense, or technically; according to the intention of the legislature; and since they must have effect, when effect can be given to them, Congress must be presumed to have meant something by the use of the word "deputy" in the act which reorganized the Treasury Department and abolished the office of chief clerk in the several bureaus therein named. It would be frivolous to assume that, by the use of the word "deputy," Congress merely intended to confer an honorary title upon an officer when a more important object can

be assigned to the word. The most reasonable construction that can be given to the word is,—that Congress intended by its use to provide a deputy to act for the First Comptroller in such ministerial duties as might properly be delegated to a deputy for performance. As the Comptroller could not, under the Constitution and laws, appoint a deputy himself, nor enlarge the powers of any officer in his bureau beyond the sphere of clerical duty, so as to constitute him his deputy, it may be inferred that Congress created the office of deputy in order to relieve the Comptroller and other accounting officers of such official work as might be performed by a deputy. Hence, to give any reasonable effect to the word “deputy” in the statute referred to, it must be construed as establishing for administrative purposes the relation of principal and deputy between two classes of officers in each of the accounting bureaus of the Treasury Department, to wit: the Comptrollers and deputy comptrollers; the Auditors and deputy auditors; the Commissioner and deputy commissioner; and that the relation so established does not extend beyond the transaction of ministerial business. The statutes are full of provisions in relation to deputy officers, which recognize the ordinary relation of deputy and principal; *e. g.*, the Judiciary act (1 Stats., 87), the Revenue act (1 Stats., 37), and the act establishing the “Post-Office” (1 Stats., 232). The latter act constituted the “deputy postmasters” deputies of the Postmaster-General. He was the principal and they were his agents. The act of August 7, 1789 (1 Stats., 49), establishing the Department of War, constituted the head of that department the President’s secretary or deputy for the purposes therein named. He was to perform and execute such duties as “might from time to time be enjoined on or intrusted to him by the President of the United States, agreeably to the Constitution, relative to military commissions, or to the land or naval forces, ships, or warlike stores of the United States, or to such other matters respecting military affairs, as the President of the United States shall [might] assign to the said department, or relative to the granting of lands to persons entitled thereto * * * or relative to Indian affairs.” Evidently the President could not assign strictly discretionary duties to this officer; but as to such duties as might be assigned, the latter was the deputy of the President.

The act of September 2, 1789 (1 Stats., 65), establishing the Treasury Department, did not make its head a deputy; it constituted the Secretary and bureau officers therein named *principal officers* in every respect, so far as their fiscal duties were concerned.

The powers and duties of the various classes of officers must be sought for in the Statutes. Some officers may delegate their powers to assistants and deputies; but most of them cannot. The Register of the Treasury may delegate to his assistant such duties as might be performed by a deputy. (Rev. Stats., 315.) The Treasurer may, in his discretion, with the consent of the Secretary of the Treasury, authorize the assistant treasurer to act in his place and discharge any or all of

the duties of the Treasurer. (Rev. Stats., 304.) The Second Comptroller and Second Auditor may each constitute a clerk in his office a deputy to sign certain papers. (Rev. Stats., 275, 279.) But it is unnecessary to examine in detail the various statutory provisions for delegations of official powers, as no general rule can be inferred from them. Indeed they mostly violate ancient common-law principles and the true meaning of the word "deputy." For instance, section 323 of the Revised Statutes makes the deputy commissioner of internal revenue a deputy of the Secretary of the Treasury rather than of the Commissioner of Internal Revenue.

It is clear, however, that the intention of Congress, in creating the offices of "assistant," "deputy," and "clerk," in the various executive departments and bureaus, was to provide aids for the heads of departments and bureaus, in order that they might more effectually and promptly perform their official duties. These aids are so many intelligent instrumentalities in the hands of the principal officers who are personally charged with executive duties and trusts. The official services of these instrumentalities are more within the meaning of the maxim, *qui dat finem dat media ad finem necessaria*, than within the maxim, *qui facit per alium facit per se*.

In the transaction of official business the latter maxim applies only to such acts of assistants, deputies, or clerks in the executive departments as might be delegated at common law to deputies for performance. While it might be held, under strict construction, that the deputy comptroller cannot, by virtue of his office, perform any duty that was not incident to the office of chief clerk of an accounting bureau of the Treasury Department, it may nevertheless be implied that the Comptroller may delegate to a deputy who has been provided for him by statute, such powers as are incident to the principal office, and as may be delegated.

In order, therefore, to ascertain how far the Comptroller can delegate his powers to the deputy comptroller, it is necessary to ascertain the extent or limitation of the powers of delegation possessed by an officer at common law.

It is a general principle of law that officers are required to exercise the functions which belong to their respective offices. (*Hill v. Paul*, 8 Cl. & F., H. L. Cas., 306.) The neglect to do so would, in some cases at common law, subject the offender to indictment. (*Work v. Hoofnagle*, 1 Yeates, Pa., 506.) But such liability attaches only to ministerial offices in which the incumbent is allowed no discretion to judge of the matter to be done, and is required to obey the mandates of a superior. (*Vose v. Deane et al.*, 7 Mass., 280; *Savacool v. Boughton*, 5 Wend., 170; *Arnold v. Steeves & Frost*, 10 *Id.*, 514; *Pierson v. Gale et al.*, 8 Vt., 512; *Hill on Trustees*, Am. ed. 1847, pp. 485, 502.) Judicial offices relate solely to the administration of justice in deciding controversies between individuals and accusations of the public against

persons charged with the violation of law. These offices are places of the highest public trust, and the law requires and assumes learning, skill, experience, and integrity in the persons performing the duties which appertain to them. Hence it is a rule of law that a judge cannot be compelled to perform a discretionary act. But for a purely ministerial act a mandamus will lie. (*Ex parte Crane et al.*, 5 Pet., 189; *Life and Fire Ins. Co. of New York v. The Heirs of Wilson*, 8 Pet., 291.)

It is well settled that duties of a judicial character cannot be delegated to, or be performed by, a deputy; but it has always been admitted that duties of a purely ministerial character may be performed by a deputy. When so performed the lawful acts of the latter are regarded in law as the acts of the principal officer, to whom *respondeat superior* will apply. When an office partakes of a judicial as well as ministerial character, as for example that of sheriff, it is also well settled that although a deputy sheriff may be made for the performance of a ministerial act, one cannot be made for the performance of a judicial act. An office judicial in its nature cannot be executed by a deputy, yet it may by custom be so granted expressly as to be lawfully performed by a deputy, as, *e. g.*, the office of recorder of London. An office ministerial in its nature may generally be executed by deputy. (Dane's Abr., chap. 75, art. 2, sec. 3; *Sir Geo. Reynel's Case*, 9 Co., 97; 3 Bac. Abr., 739—"Offices".) It is a principle of law that officers or persons acting in a discretionary capacity are not liable to an action where there is an error of judgment. This rule extends to a jury. They cannot be fined for a verdict against evidence, for the law makes them *judges of the facts and evidence*; and hence it protects them. (23 Ed. III, pl. 16; c. 70. a. 6, s. 1; *Aire vs. Sedgwick*, 2 Roll., 147, 199; *Dr. Grenville v. The College of Physicians*, 12 Mod., 388; *Mostyn v. Fabrigas*, Cowp., 161, 172; 3 Bac. Abr., "Officer," art. 1, sec. 6.) *Omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium.* (*Sutton v. Johnstone*, 1 T. R. 503; *Lumley v. Gye*, 3 El. & B., 114; *Broom's Leg. Max.*, 945.)

When is an office judicial or only ministerial? The sheriff's office is both judicial and ministerial: when he acts judicially, no action will lie against him for misconduct in office, where no fraud or corruption appears. The law decrees him to act as a *judge* when his two authorities (judicial and ministerial) concur, as, *e. g.*, in taking bail in his own court. (Dane's Abr., chap. 75, art. 2, sec. 4; *Metcalf v. Hodgson*, Hut., 120; *Pike v. Megoun et al.*, 44 Mo., 491.) Where *discretionary* power to grant or refuse licenses for keeping inns and ale houses was given to the justices of the peace, no action would lie against them for a refusal to grant a license. (*Basset v. Godschall et al.*, 3 Wils., 121; *Hamond v. Howell*, Recorder of London, 2 Mod., 218; *The King v. The Bishop of Litchfield*, 7 Mod., 5; *Rex v. Young and Pitts*, 1 Burr., 556.) When the judgment is wrong and the intention pure, an officer exercising discretionary power cannot be punished in any manner. (9 Ed. IV, 3, pl. 10; 21 Ed. IV, 67, pl. 41; *Rex v. Lenthal*, 3 Mod., 150.) As to the acts of dep-

ties the general rule is *respondeat superior*. The officer shall answer for his deputy as though he did the act himself; but, *criminaliter*, the deputy answers for his own acts. When an officer may take one, two, or more sureties on a bond, or prescribe the penalty thereof, according to his discretion, as, for instance, a bail bond, the bond must be taken by the officer himself. (*Cotton v. Wale*, Cro. Eliz., 862; Cro. Jac., 289; *Rogers v. Reeves*, 1 D. & E., 421.) Such bond can only be assigned under the officer's own hand and official seal. Whenever an officer is to swear he must be present and assent. (*Dominus Rex v. Ellis*, 2 Stra., 994.) The sheriff holds the office of sheriff, the deputies do not; they are his servants; but sheriff and coroner, and sheriff and marshal, are different offices. (*Watson v. Todd*, 5 Mass., 271; *Gardner v. Hosmer*, 6 Mass., 325.) Under the laws of the United States, the deputy marshal has the like relation to the marshal and to the public as that of deputy sheriff to the sheriff. (Judiciary act of September 24, 1789, sec. 27, 1 Stats., 87; and act of February 28, 1795, sec. 9, 1 Stats., 425.)

Where by law the principal is empowered to execute his office *by himself or deputy*, it has ever been a fair construction of the grant that if the principal deputize at all, he must give his whole power in the case to be acted on; but he may limit the deputy to a single case or action. (*Norton v. Simmes*, Hob., 12; *Milton v. Johnson*, 1 Ld. Raym., 161; *Parker v. Kett*, 12 Mod., 467; *Leak et al. v. Howel et al.*, Cro. Eliz., 533.)

"I am of opinion that said persons, deriving an authority by writing under the hand of the *deputy-steward*, were sufficiently empowered to receive the surrender. And I go upon this ground, that Osman Clerke, being deputy of the steward, is thereby invested with *all the power*, and *may do all such acts* as his principal could do; for the nature of deputation is to convey *all the power* of the principal, *without any reservation or restriction*; for, as he cannot enlarge his deputy's power by giving him a greater one than himself, so he cannot abridge it by reserving part to himself." (Holt, C. J., in *Parker v. Kett*, 12 Mod., 467; *Norton v. Simmes*, Hob., 12; *Combes's Case*, 9 Co., 75.)

It is said that the registers of the Land Office and the receivers of public moneys "are executive and ministerial officers. They sometimes act judicially, as in determining the right of pre-emption, just as we say some of the acts of a sheriff are ministerial, and some judicial. * * * When it is said that an act pertaining to a ministerial office is judicial in its nature, the meaning is, that it cannot be performed by deputy, and *that is the use of the distinction between ministerial and judicial acts in executive offices.*" (*Lewis v. Lewis*, 9 Mo., 187.)

"The grant of judicial power is made to an officer [clerk of district court], recognized by the Constitution, and elected by the people; not to the deputies whom he appoints and dismisses at pleasure." (*Gerald v. Gerald*, 5 La. Ann., 245.) Most political or executive officers are such as are not connected immediately with the administration of justice or the execution of the mandates of a superior officer, yet many of their offices

more or less combine ministerial duties with those of a judicial character. Of such are the offices of heads of departments and bureaus in the executive branch of the government. These are offices of great discretionary trusts, in which judgment and prudence, and frequently a knowledge of law, are necessary for their faithful execution. The accounting officers of the Treasury act as judges of law and fact on claims and accounts, and other matters coming before them. They are to that extent judicial officers and fall under the ordinary rule, that "an individual clothed with judicial functions cannot delegate the discharge of these functions to another, unless he be expressly empowered to do so under specified circumstances." (Broom's Leg. Max., 840.) Similarly, when the duties of an office imply special learning, or skill and integrity on the part of the incumbent as considerations for the grant of the office, the duties thereof cannot, without consent of the grantor, be delegated. (Cockran v. Irlam, 2 M. & S., 301, n. (a); Miles v. Bough, 3 Q. B., 845; Allan v. Waterhouse, 8 Scott, N. R., 68, 76; and see, generally, the words of commissions of public officers.) Hence, although a public officer may generally delegate a ministerial duty to a deputy, such officer cannot delegate to another officer or person the performance of a quasi-judicial duty, or such a ministerial duty as the incumbent should himself perform. (Broom, Pr. C. C., 2d ed., 9.) An arbitrator cannot lawfully devolve his duty on another unless he is expressly authorized so to do. (Bell, Dict. and Dig. of Scotch Law, 280, 281, 292; Whitmore v. Smith, 7 H. & N., 509; and many other cases referred to in Broom, Legal Maxims, 7 Am. ed., 840, 841; notes 3, 4, 5.) A magistrate, as observed by Lord Camden, can have neither assistant nor deputy to execute any part of his employment. The right, he says, is personal to the magistrate, and is a *trust* that he can no more delegate to another than a justice of the peace can transfer his commission to his clerk. (Entick v. Carrington, 19 Howell, St. Trials, 1063; O'Reilly v. Edrington, 96 U. S., 724.)

The accounting officers in the Department of the Treasury are intrusted by statute with many important discretionary and quasi-judicial powers. It is easy to gather from the principles laid down in the books, and from numerous decisions of the courts, that when it is the duty of such officers to apply law to facts, and to find facts from evidence, in the execution of their offices, such duty cannot be delegated to a deputy.

It would be much less difficult to enumerate the quasi-judicial acts required to be performed by the First Comptroller than to designate the merely ministerial functions which pertain to his office. Almost every one of his official acts implies the exercise of discretion, an examination of evidence, or the construction and application of law to special cases. Indeed, when he has the ability to advise in respect to the application of common or statute law to fiscal transactions which must culminate in the settlement of an account in the Treasury Department, his views are asked for more frequently than those of any other law officer in the executive departments; and, with regard to the amounts of money

involved, on more important questions also. It is laid down as a general rule by Justice Story, in *Allen v. Blunt* (3 Story, C. C. R., 745), that "when a particular authority is confided to a public officer to be exercised by him in his discretion upon an examination of facts, of which he is made the appropriate judge, his decision upon these facts is, in the absence of any controlling provisions, absolutely conclusive as to the existence of those facts." In *Martin v. Mott* (12 Wheat., 19) it was held that the decision of the President as to the exigency of calling forth the militia to suppress insurrection, to repel invasions, and to execute the laws of the United States, is conclusive on all branches of the government. It was held in *Allen v. Blunt* that the decision of the Commissioner of Patents is conclusive as to the law and facts arising under an application for a patent, unless it be impeached for fraud or connivance with the patentee, or an excess of authority be manifest on the face of the papers. In the *Philadelphia and Trenton Railroad Company v. Simpson* (14 Pet., 458) it was held by the Supreme Court that where an act is to be done or patent granted upon evidence and proofs to be laid before a public officer, upon which he is to decide, the fact that he has done the act or granted the patent is *prima facie* evidence that the proofs have been regularly made, and were satisfactory; and that no other tribunal is at liberty to re-examine or controvert the sufficiency of such proofs, if laid before him, when the law has made such officer the proper judge of their sufficiency and competency. The court said: "This has been the uniform construction, as far as we know, in all our courts of justice upon matters of this sort." Applying this doctrine to the certification of balances arising on accounts and the countersigning of warrants drawn by the Secretary of the Treasury, it is unquestionable that in the performance of these duties the Comptroller acts in a quasi-judicial and not in a ministerial capacity. His action in certifying balances involves the examination of evidence and the application of laws to the facts found. His action in countersigning warrants granted for the payment of such balances involves a further examination of law and facts; law, as, for example, whether the warrant drawn by the Secretary is "warranted by law" (1 Lawrence, Compt. Dec., Appx. Ch. XII.—"Countersigning of Warrants"); fact, as to whether the appropriation against which it is drawn is available. The latter is sometimes a mixed question of law and fact. Indeed, it would be difficult to discover a purely ministerial duty in the official transactions of the Comptroller. In the performance of his duties he does not act by or under the authority of a superior; hence his acts are not, in the strict sense of the word, ministerial; his duties are judicial in character. (1 Lawrence, Compt. Dec., Appx. *ubi supra*.) A *ministerial* office is defined as one which is executed under the authority of a superior. (Bouv. L. Dict.) As the sheriff holds a ministerial office, he is bound to obey the judicial command of the court. When an officer acts in both a ministerial and judicial capacity, he may, perhaps, be compelled to perform mere minis-

terial acts in a particular way; but when he acts in a judicial capacity he can only be required to proceed, and the manner of doing so is left entirely to his judgment. (Bac. Abr., "Justices of the Peace" (E); *Fox v. Hills*, 1 Conn., 295; *Betts v. Dimon*, 3 *Id.*, 107; *Stratford v. Sanford*, 9 *Id.*, 275, 282; *Crane v. Camp*, 12 *Id.*, 464.) In regard to the duties of the Comptroller which require the exercise of discretion, it is difficult to point out any one of them that is distinctively ministerial, and for the performance of which a mandamus would be granted. It is well settled that a *mandamus* may be issued against an officer when he refuses to perform a purely ministerial duty, and there is no other remedy at law.

"The objections to proceeding against State officers by mandamus or injunction are: first, that it is in effect proceeding against the State itself; and, secondly, that it interferes with the official discretion vested in the officers. It is conceded that neither of these things can be done. A State, without its consent, cannot be sued by an individual, and a court cannot substitute its own discretion for that of executive officers, in matters belonging to the proper jurisdiction of the latter. But it has been well settled that when a plain official duty, requiring no exercise of discretion, is to be performed, and performance is refused, any person who will sustain personal injury by such refusal may have a *mandamus* to compel its performance; and when such duty is threatened to be violated by positive official act, any person who will sustain personal injury thereby, for which adequate compensation cannot be had at law, may have an injunction to prevent it." (Board of Liquidation *et al.* v. McComb, 92 U. S., 541; *Kendall v. The United States*, 12 Pet., 524; *The Borough of Uniontown v. The Commonwealth*, 34 Penn. St., 293; *Habersham et al. v. Savannah and Ogeechee Canal Co.*, 26 Ga., 665; *State of Iowa, &c., v. County Judge, &c.*, 7 Iowa, 186; *State, &c., v. Bailey, &c.*, *Id.*, 390.)

Where the necessity of acting at all is a matter of discretion, mandamus will not lie even to compel action (*Brashear v. Mason*, 6 How., 92; *State, &c., v. County Judge, &c.*, 5 Iowa, 380), or where any discretion is to be exercised in the matter (*Reeside v. Walker*, 11 How., 272; *United States v. Guthrie*, 17 *Id.*, 284, 304; *Barrows v. Mass. Med. Society*, 12 Cush., 403; *Auditorial Board v. Hendrick*, 20 Texas, 60; *Magee v. Supervisors of Calaveras County*, 10 Cal., 376; *Houston v. The Levy Court*, 5 Harr. (Del.), 15, 108; *Green v. Purrell, Comptroller of the Treasury*, 12 Md., 329; *The People, &c., v. The Inspectors, &c., of State Prison*, 4 Mich., 187; *The State, &c., v. The Governor, &c.*, 5 Ohio St., 528; *The State, &c., v. The Judge, &c.*, 14 La. Ann., 60; *Merced Mining Co. v. Fremont*, 7 Cal., 130; *Goheen v. Myers*, 18 B. Monr., 423; *The Queen v. Law*, 7 Ell. & B., 366); and it will only lie to compel action generally (*San Francisco Gas Co. v. Board of Supervisors*, 11 Cal., 42; *Ex parte Mahone*, 30 Ala., N. S., 49; *Castello v. Saint Louis Circuit Court*, 28 Mo., 259.) The Court of Claims has jurisdiction in a great variety of cases, where parties are refused favorable action by the accounting officers. It therefore follows that when a National court has jurisdiction to afford relief in respect of the subject-matter complained of a mandamus will not

lie against the Comptroller. In various other cases the remedy is in the State courts, in an action at law against the local officers, as, for instance, against a revenue collector, when the Comptroller refuses to certify a balance due on an account for the refund of taxes alleged to have been wrongfully collected. Indeed it is doubtful whether a mandamus would lie against the Comptroller for any official act whatever. The writ may be regarded as a touchstone of purely ministerial functions. Where that touchstone fails to affect the powers of the Comptroller, it is because the functions are judicial or discretionary in their nature.

"A judicial officer cannot make a deputy, because he is called to do justice." (Viner, Abr., "Officer," I. 7.) "He that has an office of trust cannot make a deputy." (*Id.*, 4, note.) "When there is trust and confidence reposed in an officer, he cannot make a deputy, unless empowered by express words." (*Id.*, 4, note; 11 Ed. IV, 1.) Indeed it is only by ancient custom, presuming a grant of power, that a sheriff or constable might make a deputy. (Viner, Abr., "Officer," I. 8.) When the office requires on the part of the incumbent special knowledge and skill, it cannot be exercised by deputy unless it be granted *per se vel deputatum suum*. (Woodward v. Aston, Freem. Rep., 429.) "An office which concerns the King's revenue cannot be executed by deputy." (Law v. Law, Chanc. Cases, temp. Talbot, 141.) The limitations of power of deputation at common law are clearly drawn in the case of the King's grant of the office of sheriff for life to Henry, Earl of Northampton (Br. Patents, pl. 45), "to have, occupy, and execute that office, and all other offices belonging to the sheriff in the county aforesaid, by himself or his sufficient deputy." It was held in this case that the sheriff could not make a deputy, "for the King cannot grant to a man to make an officer of record to serve the King's courts, nor to make a justice." (Viner, Abr., "Officer," I. 2, 3.)

"The nature of deputation is to convey all the power of the principal without any reservation or restriction," per Holt, C. J., delivering the opinion of the court, in Parker v. Kett, 12 Mod., 467.

It is well known that, in practice, a deputy sheriff or deputy marshal frequently appoints an agent or sub-deputy (special deputy) to serve a writ of subpoena or like process; but this is a violation of the sound common law principle; for unless the grant of an office be not only *per se vel deputatum suum*, but also *per deputatum deputati*, the deputy cannot make a deputy. (Viner, Abr., "Officer," L. 3.) But it is now held that acts done by a deputy *de facto*, though not *de jure*, as by a deputy's deputy, are valid, as being done in the proper office and in conjunction with the *de jure* officer. (Leak et al. v. Howel et al., Cro. Eliz., 534.) Hence the practice referred to rests on the validity of the thing done by a person acting in an office *de facto*, and not on a legitimate deputation of an office. The practice being so general, however, Broom says, without qualification, that when the particular act to be done is within a general deputy's scope of authority, he may constitute another person

his servant or bailiff to do it. (Broom, Leg. Max., 7 Am. ed., 841.) It is only important to allude to this practice as showing an innovation by custom on common-law principles. The lawful deputy can always sign his principal's name in the execution of delegated power; for, as already shown, the deputation conveys all the powers of the principal which may be necessary and proper to perform the act. (Holt, C. J., *supra*.) All returns made by a deputy must be "made in the name of the principal officer, and not in his own name" (Phelps v. Winchcomb, 3 Buls., 78); because the act to be done is the act of the principal, not of the deputy. (Lane v. Cotton *et al.*, 1 Salk., 18, 19; Godolphin v. Tudor, 6 Mod., 235.) For the act to be done no power is reserved in the principal officer. (Parker v. Kett, 12 Mod., 467.) The principal officer cannot abridge the deputation by reserving a part of the power to himself. (*Id.*)

From the foregoing, it may be laid down as a rule that a deputy acting within the scope of his authority may sign his principal officer's name. (See Milton v. Johnson, 1 Ld. Raymd., 161; Hunter's Ad'rs. v. Miller's Ex'rs., 6 B. Mon., 621; Bank of Kentucky v. Garey, *Ib.*, 629; Triplett *et al.* v. Gill *et al.*, 7 J. J. Mar., 440; Commonwealth v. Arnold, 3 Littell, 316; Hope v. Sawyer, 14 Ill., 254; Beaumont & Irwin v. Yeatman *et als.*, 8 Humph., 542; McRaven v. McGuire, 9 S. & M., 34.)

Where a deed was signed by a daughter, thus: "Polly Gwinn by Mary G. Gardiner," for and at the request of her mother and in her presence, and the deed was objected to in a suit, on the ground that when a deed is executed by an agent or attorney the authority to do so must be derived from an instrument under the grantor's seal: *Held*,

"This is a good rule of law, but it does not apply to the present case. The name, being written by another hand in the presence of the grantor, and at her request, is her act. The disposing capacity, the acts of mind which are the essential and efficient ingredients of the deed, are hers, and she merely uses the hand of another, through incapacity or weakness, instead of her own, to do the physical act of making a written sign. Whereas, in executing a deed of attorney, the disposing power, being delegated, is with the attorney, and the deed takes effect from his act; and therefore the power is to be strictly examined and construed, and the instrument conferring it is to be proven by evidence of as high a nature as the deed itself. To hold otherwise would be to decide that a person having a clear mind and full capacity, but through physical inability incapable of making a mark, could never make a conveyance or execute a deed; for the same incapacity to sign and seal the principal deed would prevent him from executing a letter of attorney under seal.

"It appears to us, that the distinction between writing one's name in his presence and at his request and executing a deed by attorney is obvious, well-founded, stands on satisfactory reasons, and is well sustained by authorities." (Gardner v. Gardner, 5 Cush., 483; Ball v. Dunster-ville, 4 T. R., 313; The King v. Longnor, 1 Nev. & M., 576; S. C., 4 B. & Ad., 647; 2 Greenl. Ev., sec. 295.)

So, when a wife in the habit of managing her husband's business, *inter alia* of drawing, accepting, and indorsing bills in his name, and on one occasion a promissory note was indorsed by her daughter in his name,

in the presence of and by the direction of the wife : *Held*, that the principle *delegatus non potest delegare* did not apply ; that when the husband authorized the wife to draw, accept, and indorse bills in his name, the power may be fairly extended to authorizing her to select some person, *pro hac vice*, to write the name of her husband for her. (Lord v. Hall, 8 C. B., 627; 65 E. C. L. R. See Lindus v. Bradwell, 5 C. B. 583; 57 E. C. L. R.; and Smith v. Marsack, 6 C. B., 486; 60 E. C. L. R.)

But while it is clear that a deputy may, within the scope of his delegated power, sign his principal officer's name, will the rule hold good in the case of signing or countersigning a treasury warrant ?

On general principles, one would suppose that the mere signing of a name—a merely mechanical act—is a matter that could well be delegated to a deputy, and especially so when the deputy acts as such by authority of law, as in the case of deputy comptroller; yet, if the signing involves the exercise of discretion, legal skill, or the performance of a trust, it is unquestionable that it cannot be done by a deputy without express authority of law. The right of any accounting officer to perform any official duty by deputy can only be implied from the word "deputy" in the act reorganizing the Department of the Treasury. When it is considered that the duties of these deputies are expressly defined by law as those pertaining to the office of chief clerk of their respective bureaus, which was abolished by that act (15 Op. Att. Gen., 3), the most that can be implied, in respect of delegation of duties, from the word "deputy" is, in view of the maxim *expressio unius est exclusio alterius*, that such duties only as require no exercise of discretion in their performance can be delegated by accounting officers to their deputies. The question whether a warrant is "warranted by law", arises on each warrant. The question whether the balance found due by an auditor is correct, arises on each account and claim acted on in the final accounting offices. These are questions of law and fact, of which the statutes make the proper Comptroller the *judge*. No money can, in contemplation of law, be paid out of the Treasury until the First Comptroller has satisfied himself that it is due and payable, and that the balance certified is true and correct. He must also satisfy himself that the warrant granted by the Secretary for its payment is "warranted by law." The law provides the Comptroller with instrumentalities by which he ascertains the facts in each case. The whole accounting machinery of the department works to that end. He is presumed to be informed of the facts in such case; for it would be absurd to hold that he could decide that an accountable warrant was "warranted by law," unless there are facts to which the law can be applied. The *examination* of a warrant is a duty not only of high trust, but one judicial in its nature; and being clearly of such character, the performance of that duty cannot be delegated by the Comptroller to his deputy. The law expressly requires the Comptroller to countersign all warrants; the act of doing so is one of his highest powers. "It shall be the duty of the First Comptroller * * * to countersign all war-

rants drawn by the Secretary of Treasury, which shall be warranted by law." (Rev. Stats., 269.) The Secretary of the Treasury need not examine or draw the warrant himself: "The Assistant Secretaries * * * shall examine * * * warrants *prepared for the signature of the Secretary of the Treasury.*" (Rev. Stats., 245.) This statutory power to delegate a duty imposed on the Secretary does not include accountable warrants. But the warrant is not a lawful instrument until it is signed by the Secretary. The Assistant Secretary, although he is in effect, for many purposes, the deputy of the Secretary, had not, by virtue of his office, the power to sign any Treasury warrants, although the law had committed to him the responsible duty of *examining* the warrants before the Secretary should sign them. It was considered by Congress that the power to sign a warrant could not be delegated by the Secretary himself; and therefore it was expressly provided that he might delegate that power to one of the Assistant Secretaries, "by an appointment under his hand and official seal." (Rev. Stats., 245, 246, 247.) This special legislation furnishes strong implication against the validity of any delegation of power to the deputy comptroller for the countersigning of warrants, even though the act of signing be regarded as a purely ministerial function; for when the legislature has prescribed the *forms* to be used by a ministerial officer there must be a substantial compliance therewith. (Wiseman v. Lynu, 39 Ind., 258; Waldron v. Berry, 51 N. H., 136; Warner v. The People, 2 Denio, 281; Benford v. Gibson, 15 Ala., 524.) When a ministerial office is granted to be executed in person it cannot be delegated. (Rex v. Lenthal, 3 Mod., 150; Coffin v. The State, 7 Ind., 158.) Public officers and agents are held more strictly within the limits of their prescribed powers than private general agents. A contract made by a public agent, relating to a subject within the general scope of his powers, does not bind his principal, if there was a want of specific power to make it. (Parsel v. Barnes & Bro., 25 Ark., 261; S. P., *Id.*, 272.) The powers of public officers must be strictly pursued, else their decision or action is a nullity. (Green, &c., v. Beeson *et al.*, 31 Ind., 7; State v. Bank of State, 45 Mo., 528.)

Where the Commissioner of Internal Revenue was by statute authorized to pay, with the approval of the Secretary of the Treasury, such sums as in his judgment were necessary for detecting and bringing to trial and punishment offenders against the internal-revenue laws: *Held*, by the Attorney-General (15 Op., 90), that the independent action of each of these officials was necessary before the money could be paid. "The Commissioner cannot delegate his powers to the Secretary, nor can the Secretary delegate his to the Commissioner, any more than two judges can delegate their powers to a third judge, when the law requires * * * the judgment of a majority of a court composed of three judges."

When the signature of a person is required, he must write it himself

or make his mark. It has been decided that a public officer cannot authorize another person to affix the officer's name to an official document when the law requires it to be signed by himself: *So held* in a case where the name was written at the officer's request, and in his immediate presence, after having heard the document read. (Chapman v. Inhabitants of Limerick, 56 Me., 390.) Apply the language of the court in this case, *mutatis mutandis*, to a Treasury warrant as a very important public document:

"The officer making it is responsible for its truth and correctness. It requires no argument to show that it was never in the contemplation of the law-makers, that official certificates or returns, which the law requires of those holding certain offices, might be signed by attorney or agent, or that they could have any legal validity unless signed by the officer so that they should bear *his own handwriting*. There may be cases, unquestionably, where the signature is made by a third party, at the request of the officer, in good faith and with honest intentions by all the parties. * * * But, if we sanction this mode of authentication in such a case, we establish a doctrine which will be far reaching in its effects. It would reach to all cases where any public officer is required to sign any instrument or certificate. * * * The Governor of the State might thus sign a death-warrant. If this action by deputy was sanctioned, it would offer temptations to many officers to avoid all liability for their official misdoings, or neglects, or mistakes, by taking care to have a third party write his [the officer's] name to the return or certificate, and taking care to have the proof that it was done by his direction, difficult if not impossible. A denial of his signature would be his defense. It is well known that the President of the United States has a secretary who is authorized to sign the name of the President to land-warrants. But this is given by a special law, and the fact that such a law was required, before the President could be relieved from the drudgery of signing each warrant, is strongly corroborative of the general doctrine—that *all public officers must sign their own name to their own returns and certificates of official acts.*" (See, ante, p. 69.)

This doctrine would seem to conflict in some respects with the common-law principle that ministerial officers may act by deputy, but in fact it does not; for, as has been shown, where skill in the performance of duty was implied, or where it was intended that a ministerial duty should be performed by the officer himself, such duty could not be delegated at common law. Indeed, it is questionable whether, at the early common law, any public officer could act by deputy without a grant of office *per se vel deputatum suum*. The power to depute official duty may be implied by custom in England, and that custom has come to us with the common law in relation to many local offices, *e. g.*, sheriffs, constables, marshals; but "Offices are not regarded in this country as grants or contracts, the obligations of which cannot be impaired; but rather as *trusts or agencies*; and those offices created by the legislature may be abolished by the legislature, and those created by the constitution may be abolished by the adoption of a new constitution." (Coffin v. State, 7 Ind., 157; Benford v. Gibson, 15 Ala., 521.) In a recent de-

cision of the Supreme Court the powers of assistants to heads of departments and bureaus were touched upon, but nothing definite was laid down as to the extent of such powers. The suit arose under a valid government contract for the delivery of certain Army medical supplies: "the whole amount of ice required to be consumed at each respective point and vicinity designated in the contract during the remainder of the year 1863." No quantity having been named in the contract, the assistant surgeon-general of the Army, then in Saint Louis, Mo., directed the contractor to deliver, at the points designated in the contract, thirty thousand tons of ice. Afterwards the Surgeon-General directed the assistant surgeon-general to suspend the order, which the latter did. In this case the Supreme Court held that the contractors were entitled to compensation for expenses and losses incident to the preparation made to meet the demand of the notice served on them for the thirty thousand tons of ice. The question raised was in respect to the validity of the notice of the assistant surgeon-general. The court held that it was valid: "The office of Surgeon-General is one of the distinct or separate bureaus of the administrative service of the War Department. It has been found in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office. Hence statutes have been made creating the office of assistant secretaries for all the heads of departments. It would be a very singular doctrine, and subversive of the purposes for which these latter offices were created, if their acts are to be held of no force until ratified by the principal secretary or head of department. It was to relieve the overburdened principal of some of those duties that the office of assistant was created. In the immense increase of business in the office of Surgeon-General during the war, similar relief was found necessary, and the office of assistant surgeon-general was created." (*Parish v. United States*, 100 U. S., 504.) The act under which the assistant surgeon-general acted was a war measure (12 Stats., 378), and it would be unwise to accept rules founded on such legislation. Yet the decision construes the powers of assistants to heads of departments and bureaus generally; and unquestionably the object intended to be accomplished by the creation of the offices is correctly stated by the court. The decision stops there, however; it leaves us in the dark as to whether such assistants may or may not exercise any or all of the ministerial or discretionary powers of their principal officers. It would be unsafe in a state of war to hold subordinate officers within the strict limits of their lawful powers. This is especially true of the medical department of the Army in the field. Even though the act done by the assistant surgeon-general had far transcended his authority, the court might well, under the circumstances of the case, hold it valid. This case decides nothing as to the extent or limitation of the authority of an assistant to the head of a department

or bureau. (See *Alvord v. United States*, 95 U. S., 358.) A much stronger instance of delegation of power to contract and to vary the contract is that given by the Secretary of War to General B. F. Butler, approved by the President, September, 1861, by which that general's requisitions on the staff departments of the Army (*including the Ordnance*) were to be obeyed. Under this authority, one C. K. Garrison entered into a contract with General Butler for the delivery to the latter of six thousand rifles of a certain pattern. Thereafter General Butler agreed to accept another kind of rifle, and the Supreme Court did not question the legality of the contract. (*Garrison v. United States*, 7 Wall., 688.)

III. The law has established the relation of principal and deputy between the heads of the accounting bureaus of the Treasury and their next ranking officers. It assumes ability, knowledge, and integrity in the deputies to properly perform the duties of the principal office when the head of the bureau is unable by reason of sickness or absence to perform them himself; and, if well settled principles of law are ignored, it would seem to be unreasonable to deny the propriety of an assignment by the heads of bureaus to their deputies, of such duties as would relieve the former from merely routine work, as, for example, from matters falling under decided principles, and allow them to devote more time to new questions and the more important intellectual labors of office. In this view of the case there would seem to be no impropriety in delegating to a deputy such matters, when he would act upon them while the principal officer is present and supervising all the official work of his bureau. But principles of law cannot be ignored. The Comptroller's signature is a part, a most important part, of a Treasury warrant. A countersigned Treasury warrant is the key which opens the Treasury of the Nation. The delivery of this key is the execution of a special trust which is reposed in the First Comptroller under his commission, and *such trust cannot be delegated*. The countersigning of an instrument that commands the Treasurer of the United States to open the vaults of the Treasury and pay out the public revenue is an act of the very highest trust. Were the Comptroller to delegate such a trust to a deputy, however made, he would, in the absence of statutory authority therefor, violate the trust and act against logical analogy, law, and sound principles of public policy. The word deputy in the statute cannot be construed as carrying with it implied authority for the delegation by accounting officers of any powers which are not strictly ministerial in character. But if, in any case, the act of countersigning a Treasury warrant is admitted to be ministerial, it is certainly a power which the law requires the Comptroller to exercise himself, and hence he cannot delegate it. But the countersigning of a Treasury warrant is not a ministerial duty; it is the act of a judge who must decide whether the warrant is or is not "warranted by law." When the two authorities of the Comptroller—judicial and ministerial—

concur, the law deems him to act as a judge. (Dane's Abr., c. 75; art. 2, s. 4.) If relief beyond that for routine ministerial acts was contemplated, Congress has, from insufficiency of words, failed to grant it; for, in respect of any other official acts, the accounting deputies are not, either in fact or in the legal sense of the word, deputies at all. This is certainly true as to the deputy in the office of the First Comptroller; for the Comptroller's office is of such a decidedly quasi-judicial character that if there be any ministerial functions to be performed in it, they are so intimately connected with judicial or discretionary ones that they cannot well be severed. It is clear, therefore, that the First Comptroller cannot, under present legislation, assign any of his official functions to a subordinate officer of his bureau, or to any other officer whatever. He can avail himself of the labor, experience, abilities, and knowledge of his clerks, and use them as so many instrumentalities and aids in the performance of his official duties.

IV. Upon the principles stated, and from the provisions of law cited, it may be confidently asserted that public policy, so far as it can be discerned in precedents, practice, and the statutes, forbids any public officer having fiscal duties to perform to delegate any part of those duties to another person who is not by law authorized to perform them. Hence, it must be held that where a public officer or agent is by law or regulation empowered to draw a draft or issue a check for the payment of public money, such draft or check must always be signed by the agent or officer himself. It has never, in the business of banking, been considered that the cashier of a bank could delegate to any officer of the bank, or clerk, or other person, his power to draw a draft or sign a check. The act of signing such paper is the execution of a trust, and it cannot be delegated. The act of signing a disbursing officer's check is likewise an execution of a trust—a public trust; and, hence, the answer to the question submitted is,—that a disbursing officer or disbursing agent cannot confer lawful authority on his clerk, or on any other person, to sign checks or drafts in his own name or in the name of such officer or agent, upon any public funds deposited to the credit of such officer or agent with the Treasurer of the United States or with an assistant treasurer or designated depository of public moneys.

TREASURY DEPARTMENT,

First Comptroller's Office, February 6, 1882.

Circular instructions relative to public moneys and official checks of United States disbursing officers. (Ante, p. 64.)

1876.
DEPARTMENT No. 107. }
Ind. Treasury Div. No. 28. }

TREASURY DEPARTMENT,
Washington, D. C., August 24, 1876.

The following sections of the Revised Statutes are published for the information and guidance of all concerned :

“SECTION 3620. It shall be the duty of every disbursing officer having any public money intrusted to him for disbursement, to deposit the same with the Treasurer or some

one of the assistant treasurers of the United States, and to draw for the same only as it may be required for payments to be made by him in pursuance of law; and all transfers from the Treasurer of the United States to a disbursing officer shall be by draft or warrant on the Treasury or an assistant treasurer of the United States. In places, however, where there is no Treasurer or assistant treasurer, the Secretary of the Treasury may, when he deems it essential to the public interest, specially authorize in writing the deposit of such public money in any other public depository, or, in writing, authorize the same to be kept in any other manner, and under such rules and regulations as he may deem most safe and effectual to facilitate the payments to public creditors.

"SECTION 5488. Every disbursing officer of the United States who deposits any public money intrusted to him in any place or in any manner, except as authorized by law, or converts to his own use in any way whatever, or loans with or without interest, or for any purpose not prescribed by law withdraws from the Treasurer or assistant treasurer, or any authorized depository, or for any purpose not prescribed by law transfers or applies any portion of the public money intrusted to him, is, in every such act, deemed guilty of an embezzlement of the money so deposited, converted, loaned, withdrawn, transferred, or applied; and shall be punished by imprisonment with hard labor for a term not less than one year nor more than ten years, or by a fine of not more than the amount embezzled or less than one thousand dollars, or by both such fine and imprisonment."

In accordance with the provisions of the above sections, any public money advanced to disbursing officers of the United States must be deposited immediately to their respective credits, with either the United States Treasurer, some assistant treasurer, or designated depository, other than a national bank depository, nearest or most convenient, or, by special direction of the Secretary of the Treasury, with a national bank depository, except—

(1.) Any disbursing officer of the War Department, specially authorized by the Secretary of War, when stationed on the extreme frontier or at places far remote from such depositaries, may keep, at his own risk, such moneys as may be intrusted to him for disbursement.

(2.) Any officer receiving money remitted to him upon specific estimates, may disburse it accordingly, without waiting to place it in a depository, provided the payments are due, and he prefers this method to that of drawing checks.

Any check drawn by a disbursing officer upon moneys thus deposited, must be in favor of the party, by name, to whom the payment is to be made, and payable to "order" or "bearer," with these exceptions:

(1) To make payments of individual pensions, checks for which must be made payable to "order," (2) to make payments of amounts not exceeding twenty dollars, (3) to make payments at a distance from a depository, and (4) to make payments of fixed salaries due at a certain period; in either of which cases, except the first, any disbursing officer may draw his check in favor of himself or bearer for such amount as may be necessary for such payment, but in the last-named case the check must be drawn not more than two days before the salaries become due.

Any disbursing officer or agent drawing checks on moneys deposited to his official credit, must state on the face or back of each check the object or purpose to which the avails are to be applied, except upon checks issued in payment of individual pensions, the special form of such checks indicating sufficiently the character of the disbursement.

Such statement may be made in brief form, but must clearly indicate the object of the expenditure, as, for instance, "pay," "pay-roll," or "payment of troops," adding the fort or station; "purchase of subsistence" or other supplies; "on contract for construction," mentioning the fortification or other public work for which the payment is made; "payments under \$20;" "to pay foreign pensions," &c.

Checks will not be returned to the drawer after their payment, but the depository

with whom the account is kept shall furnish the officer with a monthly statement of his deposit account.

No allowance will be made to any disbursing officer for expenses charged for collecting money on checks.

In case of the death, resignation, or removal of any disbursing officer, checks previously drawn by him will be paid from the funds to his credit, unless such checks have been drawn more than four months before their presentation, or reasons exist for suspecting fraud.

Every disbursing officer when opening his first account, before issuing any checks, will furnish the depository on whom the checks are drawn, with his official signature duly verified by some officer whose signature is known to the depository.

For every deposit made by a disbursing officer, to his official credit, a receipt in form as below shall be given, setting forth, besides its serial number and the place and date of issue, the character of the funds, i. e., whether coin or currency; and if the credit is made by a disbursing officer's check transferring funds to another disbursing officer, the essential items of the check shall be enumerated; if by a Treasury draft, like items shall be given, including the warrant number; the title of each officer shall be expressed, and the title of the disbursing account shall also show for what branch of the public service the account is kept, as it is essential for the proper transaction of departmental business that accounts of moneys advanced from different bureaus to a disbursing officer serving in two or more distinct capacities, be kept separate and distinct from each other, and be so reported to the department both by the officer and the depository—the receipt to be retained by the officer in whose favor it is issued

No. —.

OFFICE OF THE U. S. (*Assistant Treasurer or Depository*),
_____, _____, 18—.

Received of _____, _____ *dollars, consisting of* _____, *to be placed to his credit as* _____, *and subject only to his check in that official capacity.*

\$_____. _____, U. S. (*Assistant Treasurer or Depository*.)

These regulations are intended to supersede those of January 2, 1872.

CHAS. F. CONANT,
Acting Secretary.

IN THE MATTER OF THE MILEAGE TO WHICH UNITED STATES MARSHALS ARE ENTITLED FOR SERVING PROCESS ISSUED IN CRIMINAL CASES BY COMMISSIONERS OF THE CIRCUIT COURTS.—MARSHALS' MILEAGE CASE

1. Marshals of the United States are entitled to mileage for the distance actually and necessarily traveled, "in going only, to serve any process" issued by commissioners of circuit courts for the arrest of persons accused of crime.
2. When such process is issued by a commissioner distant from the place where the crime or offense is alleged to have been committed, it should generally be made returnable to the commissioner nearest to the latter place. But, in such case, the right of the marshal to mileage for the distance actually and necessarily traveled in going from the place where the process is issued to the place where it is served is not defeated by the clause in section 829 of the Revised Statutes, which provides that the mileage of the marshal shall "be computed from the place where the process is returned to the place of service."
3. The word "returned" in the clause referred to was originally employed in the act of February 26, 1853 (10 Stats., 164), with reference to the common practice of making return of process issued by clerks of courts and circuit court commissioners to the officer by whom it was issued; and therefore it is not to be so construed as to deprive the marshal of the clear right, conferred by law upon him, to mileage for going to serve the process.

In January, 1881, a warrant of arrest on a criminal charge was issued at Sevierville, in the eastern district of Tennessee, by a commissioner of the circuit court of the United States (Rev. Stats., 627, 727, 1014), and there delivered to a deputy marshal, who served it by arresting the accused at a point eighty-three miles distant; and, to save expense, the defendant was taken for examination before the nearest commissioner, at Blackwater, only four miles from the place of arrest. The marshal has charged mileage for the eighty-three miles traveled in going to make the arrest. It sufficiently appears that the travel was actually and necessarily performed. It has long been a disputed question, which is now submitted to the First Comptroller for decision, whether, in such case, the marshal is entitled to mileage for the distance actually and necessarily traveled, or only from the place where the process is served to the office of the commissioner before whom the accused is taken for examination. By the former rule, in this case the mileage would be for eighty-three miles; by the latter, only four. The courts for this district are held at Knoxville.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The original act of Congress prescribing mileage for a marshal was that of May 8, 1792, section 3 (1 Stats., 276), which gave him "for his travel out in serving each writ, warrant, attachment, or process aforesaid [in chancery], five cents per mile, to be computed from the place of service to the court where the writ or process shall be returned; and if more persons than one are named therein, the travel shall be computed from the court to the place of service which is most remote, adding thereto the extra travel necessary to serve it on the other." All process was then, and generally ever since, made returnable to the court from which it issued. (Act March 2, 1793, 1 Stats., 335, sec. 7; Conkling's Treatise, 302, 336; Rev. Stats., 917, 918). Under the original act the place "where the writ or process shall be returned," being the same place where it was issued, the word "returned" had precisely the same legal effect as the word "issued."

Criminal jurisdiction in respect to arresting, imprisoning, or bailing persons for any crime or offense against the United States, with authority in such case to issue process to marshals, was first given to circuit court commissioners, by the act of August 22, 1842, section 1 (5 Stats., 516; Rev. Stats., 627, 727, 1014, 1983.—See, in respect to their civil jurisdiction, the acts of September 24, 1789, section 33; 1 Stats., 91; March 2, 1793, section 4; 1 Stats., 334; February 20, 1812, section 1; 2 Stats., 679; and March 1, 1817, 3 Stats., 350.) The act of September 24, 1789, section 27 (1 Stat., 87; Rev. Stats., 787), having made it the duty of the marshal "to execute throughout the district all lawful precepts directed to him, and issued under the authority of the United States," it became his duty, by force of this statute, and of the act of 1842, to execute warrants issued by commissioners. It is well settled in princi-

ple, that the duty to execute the new process attached by force of this legislation.

The provision in the act of May 8, 1792, regulating the fees of marshals for executing writs, &c., remains substantially as originally enacted. The act of February 26, 1853 (10 Stats., 164), which has been carried into the Revised Statutes, Title XIII, Chapter Sixteen, prescribes the compensation of marshals——

“For travel in going only to serve any process, warrant, attachment, or other writ, including writs of subpoena in civil and criminal cases, six cents per mile, to be computed from the place of service, to the court or place where the writ or process is returned; and if more than one person is served therewith, the travel shall be computed from the court to the place of service which shall be the most remote, adding thereto the extra travel, which is necessary to serve it on the others.” (Rev. Stats., 829.)

Criminal process issued by a circuit court commissioner is not returned to the court of the district, but copies thereof are to be returned into the office of the clerk of the proper court. It is clear from the words of the act referred to that in the case stated the marshal is entitled to mileage for eighty-three miles. When the act of May 8, 1792, was passed, and up to the act of August 22, 1842, all criminal process was issued by the clerk of the proper court at his office in the district where the court was held, and was returnable there. The marshal was entitled, as the act of 1792 said, “for his travel out in serving each writ,” or, as the act of 1853 says, “for travel in going only to serve any process.” The intention is plain that he shall have mileage for his actual and necessary travel in going to serve the writ. A marshal having sundry writs might make a circuitous but continuous route of travel to serve process on half a dozen different parties, reaching the most remote one last. To prevent the abuse of charging mileage by the circuitous route on the writ last served, the act of 1792 provided that the mileage should be computed “from the place of service to the court where the writ or process shall be returned”; and the latter was the place where it was issued and delivered to the marshal; or, as the act of 1853 says, “to be computed from the place of service to the court or place where the process is returned.” In contemplation of the provisions of these acts, the place of return must always be considered to be the place where the writ was issued, otherwise the marshal might be deprived of compensation “for travel in going * to serve the writ” in cases where the writ was made returnable elsewhere. Each clause of the statute had its purpose; the first fixes the right of the marshal to mileage “for his travel out”; the second directs the distance of the “travel out” to be computed by the shortest practicable route of return, whether he return by such route or a longer one. The word “returned” had the same meaning in the acts of 1792 and 1853. As to process issued now by the clerk of the court, and requiring actual travel from the office

of the clerk where the court is held, the same rule applies in computing mileage.

If the rule laid down in the act of 1853 for computing the mileage be applied *literally* to the case now under consideration, the marshal would be entitled only to mileage for four miles; but, on the other hand, it is clear that it would be improper to do this, for the marshal did not travel those four miles in going to serve the writ, and it is in "going only to serve" process that a marshal acquires any right to mileage. If this apparent conflict could raise a doubt in respect of the amount to be paid the marshal, it is to be reasonably resolved in favor of the officer. But there is no doubt he is clearly entitled to mileage for eighty-three miles. (*United States vs. Morse*, 3 Story, C. O., 91; *Cross' Case*, 8 Court Cl., 1; S. C., 14 Wall., 479; *Sleigh's Case*, 9 Court Cl., 369; *Moore's Case*, 4 Court Cl., 139.) The same result is reached by the rule of construction that effect should be given to the clear intention of the legislature, and not to defeat it by adhering too rigidly to the mere letter of the statute, or to technical rules of construction. (*Oates vs. National Bank*, 100 U. S., 244.) The intention was to give mileage for the distance actually and necessarily traveled. If necessary, the word "returned," in the expression "place where the process is returned," is to be construed as "issued." (*Oates vs. National Bank*, 100 U. S., 244; *Holiday Case*, 1 Lawrence, Comptroller's Decisions, 32.) This may be done under the rule that any construction which would lead to absurd consequences should be discarded. (*United States vs. Kirby*, 7 Wall., 482.) Any doubt that may exist must be based on the idea that the second clause of the act of 1853, in respect of computation of mileage, has some force in giving the right to mileage. But clearly this clause is only intended to prevent an abuse or misconstruction of the first clause, which does give the right "for travel, in going only," the necessary distance traveled. The word "only" clearly shows that no mileage is to be allowed for travel in returning. If the last clause is to be construed as having been intended to reduce the straight line of actually necessary travel in going, it would defeat the purpose of the first clause, and have a broader effect than its evident purpose. It is unreasonable to suppose that mileage should not be given for necessary travel in serving a commissioner's process, when it is clearly given for serving similar process when issued by the clerk of a court. It will be observed that the statute gives the marshal mileage "for travel in going only to serve any process," not for coming back to make return. If mileage for travel from the place where a writ is issued to the place where it is served be not allowed in this case, the marshal would not even be entitled to the four miles' travel from the place of arrest to the nearest commissioner. And if the writ were to be returned to a commissioner residing at the place of arrest, no mileage fees would be allowed, if literally it be only authorized "from the place where the process is returned to the place of service."

The proper practice now is to make warrants issued by commissioners

returnable in accordance with the circular of the Attorney-General; and unless sufficient reasons be shown for making service or return otherwise, any mileage claimed, in excess of that which would accrue if the circular had been complied with, should be disallowed.*

When practicable, warrants for the arrest of persons charged with crime should be issued by the circuit court commissioner nearest to the place where the defendant may be found. It is with this view that the law authorizes the circuit court to appoint as commissioners "so many discreet persons in different parts of the district as such court shall deem necessary" "on account of the extent of such district." (Act Feb. 20, 1812, 2 Stats., 678; Rev. Stat., 627, 1983.) When complaint is made before a circuit court commissioner that a crime or offense has been committed at a distant point, and there is another commissioner nearer to said point, the affidavit of the complainant should, generally, be sent to the latter commissioner; by whom the warrant of arrest should be issued. (Ex parte Bollman and Swartwout, 4 Cranch, 75; Rev. Stats., 1984.)

Mileage will be allowed for eighty-three miles.

TREASURY DEPARTMENT,

First Comptroller's Office, February 16, 1882.

IN THE MATTER OF THE AUTHORITY TO MAKE A CONTRACT, WITHOUT ADVERTISING, FOR PRINTING LITHOGRAPHIC PLATES FOR REPORT OF THE COMMISSIONER OF AGRICULTURE FOR THE YEAR 1880.—EXIGENCY CASE.

1. When a contract is made by which a party agrees to furnish a specified number of engravings to the government to be delivered in monthly installments at a specified rate per 100 sets, full performance is a condition precedent to the right to payment.
2. When the authority of the officer who made such contract continues, he and the contractor may correct the contract so as to conform to the intention of the contracting parties, and require payment in installments.
3. Section 3780 of the Revised Statutes requires the work of lithographing and engraving plates for public documents to be let by the Public Printer to the lowest bidder after advertisement, but also authorizes him to make immediate contracts, under the direction of the Joint Committee on Public Printing, when, in

* On the 4th of August, 1881, the Attorney-General issued a circular letter to the judges of the circuit courts, requesting them, respectively, to make an order as follows:

"It is further ordered, that whenever a warrant shall be issued by a Commissioner for the arrest of any person it shall be made returnable before him, provided he be the commissioner nearest or most convenient to the residence of the accused. If he is not, then he shall retain a copy of the affidavit on which the warrant is issued, and make the warrant, accompanied by the original affidavit, returnable before a commissioner having an office and acting nearest to the residence of the accused; and such commissioner shall make the examination of the party, and discharge, commit to prison, or admit to bail, as the case may be."

their opinion, the exigencies of the public service do not justify advertisement for proposals. On March 1, 1881, the committee gave the Public Printer authority to make a contract without advertisement, but the contract was not made until July 2, 1882. Held: (1) The judgment of the committee is conclusive as to the existence of the exigency which justified the making of a contract without advertisement. (2) But as the contract was not made "immediately," or within such reasonable time as might be regarded as within the meaning of that term, it was made without authority of law, and is void. No officer was authorized to ratify, and hence the acceptance by the Public Printer of the plates printed under the contract imposes no liability on the United States. (3) Time is the controlling element in exercising the power to decide if an exigency exists.

4. Under section 3732 of the Revised Statutes an authorized contract for supplies may be made in advance of, and contingent on, the making of an appropriation to pay therefor.
5. Contracts requiring expenditures in excess of appropriations are as to such excess void.
6. The government is not generally estopped from denying the validity of unauthorized contracts made by its officers.
7. Every person is bound at his peril to know the extent of the authority of public officers.
8. Contracts made on behalf of the government either without authority of law or in violation of law are generally void.
9. A statute which requires a public contract to be reduced to writing is mandatory.
 - Executory contracts made under such statute, but not reduced to writing, cannot be enforced.
10. When supplies are furnished to the United States under a void contract, and there is no authorized ratification thereof, the fact that such supplies have been applied to the beneficial use of the United States gives no right to compensation as upon a *quantum valebant*. As between private citizens a right to compensation would exist, because the party receiving the supplies thereby impliedly promises to pay their value. But the United States is not so bound, because no officer is authorized to ratify, and the principle applies that "ordinarily no man can make himself the creditor of the government by an act of his own."

The joint resolution of March 2, 1881 (21 Stat., 520), authorized the printing of 300,000 copies of the Annual Report of the Commissioner of Agriculture, for the year 1880. It is the duty of the Public Printer to purchase all materials and machinery which shall be necessary for the Government Printing Office; to take charge of all matter which is to be printed, engraved, lithographed, or bound; to keep an account thereof in the order in which it is received, and to cause the work to be promptly executed; to superintend all printing and binding done at the Government Printing Office, and to see that the sheets or volumes are promptly delivered to the officer who is authorized to receive them. (Rev. Stats., 3760.)

Whenever any charts, maps, diagrams, views or other engravings are required to illustrate any document ordered to be printed by either house of Congress, such engravings are to be procured by the Public Printer under the direction and supervision of the Committee on Printing of the house ordering the same. (Rev. Stats., 3779.) When the probable cost of such charts, maps, &c., exceeds two hundred and fifty

dollars, the lithography and engraving is to be awarded to the lowest and best bidder, after advertisement by the Public Printer, under the direction of the Joint Committee on Public Printing. But the committee may authorize him to make immediate contracts for lithographing or engraving, whenever, in their opinion, the exigencies of the public service do not justify advertisement for proposals. (Rev. Stats., 3780.)

March 1, 1881, and before the passage of the resolution referred to, the Joint Committee on Public Printing authorized the Public Printer to contract, without advertising, for a large number of expensive lithographic plates for the said annual report.

July 1, 1881, Messrs. A. Hoen & Co., of Baltimore, submitted a written proposal to do the work for \$96,000, and their proposal was accepted by the Public Printer July 2, 1881.

Appropriations for the Government Printing Office were made for the fiscal year ending June 30, 1882, by the act of March 3, 1881. (21 Stat., 455.)

February 16, 1882, the Public Printer says: "The contract was not made with Hoen & Co. until the 1st of July last, because the appropriation for public printing and binding would not justify it." (See Congressional Record, December 21, 1881; also Senate Mis. Doc. No. 20, Forty-seventh Congress, first session, December 20, 1881.)

The contract is as follows:

BALTIMORE, *July 1, 1881.*

Hon. JOHN D. DEFREES,
Public Printer, Washington, D. C.

DEAR SIR: The undersigned respectfully propose to print in their superior lithocautic process, and furnish 300,000 copies each of the twenty-two (22) colored and twenty-nine (29) plain illustrations of the Diseases of Domestic Animals, more particularly enumerated in their proposal for Special Report No. 34, and at the same rate as therein proposed of \$27.20-100 per 100 sets; and also lithograph 300,000 copies of each of the thirteen (13) colored, and one (1) plain illustrations for the Chemists' Report at the rate of \$4.80-100 per 100 sets; being the sixty-five (65) plates (35 colored and 30 plain) accompanying the Report of the Commissioner of Agriculture for the year 1880, and amounting in the aggregate to \$96,000; and to deliver the same in such monthly installments as you may direct.

We are, respectfully, your obedient servants,

A. HOEN & CO.

The above proposition is accepted July 2, 1881.

JOHN D. DEFREES,
Public Printer.

Hoen & Co. proceeded to execute the contract, and, January 23, 1882, presented to the Public Printer a voucher for work performed from November 16, 1881, to January 9, 1882, for lithographing and printing 50,000 copies each of the fifty-one plates to accompany the article on "Diseases of Domestic Animals" at \$27.20 per 100 sets, \$13,600; and for 50,000 copies each of fourteen plates to accompany the report of the chemist, at \$4.80 per 100 sets, \$2,400. This voucher was approved by the Pub-

lic Printer, and referred to the First Auditor. The latter stated an account thereon, per Report No. 228,775, dated January 27, 1882, on which he certified as follows:

(No. 228,775. Recorded January 27, 1882.)

TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE,
January 27, 1882.

I hereby certify that I have examined and adjusted an account between the United States and A. Hoen & Co. of Baltimore, Md., in amount, \$16,000, for lithographing and printing plates to accompany the Report of the Commissioner of Agriculture for 1880, and find nothing legally due them, no proper evidence having been furnished that the provisions of section 3780, Revised Statutes, have been complied with.

No evidence is filed in this case showing that an exigency existed when permission was given by the joint committee, nor does the certificate recite the fact. The letter of said committee to the Public Printer, a copy of which is transmitted herewith, and under authority of which said work is claimed to have been done, would seem to have no reference to the 300,000 copies of the Agricultural Report authorized to be printed by the joint resolution of March 2, 1881, from the fact that it bears date March 1, 1881, *one day prior to the existence of said resolution*, as appears from the statement and vouchers herewith transmitted for the decision of the First Comptroller of the Treasury thereon.

R. M. REYNOLDS,
First Auditor.

The account and vouchers are now submitted to the First Comptroller for his decision.

Hon. William Pinkney Whyte, for the claimants, made an oral argument, and presented a brief, making these points:

The discretion is lodged with the joint committee who authorized the making of a contract; and whenever the work is of that character that the public service can be better served by direct contract than by advertising, they are alone vested with authority to determine when the proper exigency exists. Once decided by the committee, its opinion becomes the law of the case. They so decided, and gave authority for an immediate contract as of March 1, 1881. The question arises, how long could that order for an immediate contract last? The answer is, until the Printer was in condition to execute it. He could not make any contract for the work until he had the manuscript of the report, and knew exactly what plates were required. The report was not delivered to the Public Printer until June 27, 1881. (See Senate Mis. Doc. No. 20, first session Forty-seventh Congress.)

There was no joint committee in June, 1881, because the Forty-sixth Congress closed on March 4 of that year, and no advertisement could have been made under their direction, or awards of bids by them at that time; so that the only authority under the law to guide the Public Printer was the order to make contract given by the joint committee March 1, 1881.

Again, there was no appropriation available until July 1, 1881. The word "immediate" was not understood by the committee to mean instan-

taneous, but was interpreted in its real sense, without anything in medio, that is, between, to wit, a contract without any advertisement between the resolution for printing and its execution. This was the sense in which the committee supposed the law-makers intended it to be understood; and it is the literal sense, as the word is used by lexicographers, so that time is not to be considered, but the intervention of anything between the order and its execution.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

There are several grounds upon which this claim cannot be paid :

I. Assuming that the contract in question is valid, and that the sum now claimed for the work performed is a ratable proportion of the price of the work agreed to be done, there is no provision requiring payment in installments (Rev. Stat., 3648); and the result is that payment cannot be required until the contract is fully performed on the part of the claimants. The agreements by the claimant to perform work, and of the government to pay therefor, are mutual and dependent; and full performance of the former is a condition precedent to the right to payment. (2 Parsons, Cont., 525, 528 n., 675; 1 Greenl. Ev., sec. 68; Slater *vs.* Emerson, 19 How., 224; S. C., 22 How., 42.) The fact that the contract was not fully performed is not of itself sufficient ground for a formal certification by the Auditor that nothing is legally due to the contractors. In such case the item claimed should, unless the contract has been terminated, be suspended until full performance on the part of the contractors. But it is probable that the claimants and the Public Printer supposed and intended that payment should be made in installments for the work performed. If so, they would now be permitted to make the written contract conform to the real intention of the parties; carefully observing, however, the requirements of section 3648 of the Revised Statutes, that "payment shall not exceed the value of the service rendered, or of the articles delivered previously to such payment." The executive officers who are authorized to "settle and adjust" claims, (Rev. Stat., 236), have power to ascertain what installments of payment are due according to the real intention of the parties to the contract; but it is their duty to require very clear proof of any intention to pay by installments before they will depart from the exact legal effect of the words used in a contract.

II. No payment can be made under this contract, because it is void.

The statute provides that, in such case as this, the lithographing of plates and the printing therefrom "shall be awarded to the lowest and best bidder after advertisement by the Public Printer, under the direction of the Joint Committee on Public Printing." The Joint Committee may, however, authorize the Public Printer to make "immediate contracts for lithographing or engraving whenever, in their opinion, the exigencies of the public service do not justify advertisements for proposals." (Rev. Stat., 3780.) On March 1, 1881, the committee gave the

Public Printer authority to make a contract without advertisement, but the contract was not made until July 2. On the law and facts stated the question arises, was the contract a valid one?

It may be conceded that the discretion of the Joint Committee, when exercised, is conclusive as to the propriety of making a contract without advertisement for proposals. (*United States vs. Speed*, 8 Wall., 77; *Cobb's Case*, 7 Court Cl., 470; *Thompson's Case*, 9 *Id.*, 188; 15 Op., 257, 243; *P. & T. R. R. Co. vs. Stimpson*, 14 Pet., 448; *Allen vs. Blunt*, 3 Story, 742; *Wilkes vs. Dinsman*, 7 How., 89; *United States vs. Arredondo*, 6 Pet., 691.) It may not be material that the authority was given March 1, after the passage of the joint resolution but before its approval, March 2. (*Holden vs. Joy*, 17 Wall., 226, 227.)

But for other reasons the so-called contract is void.

1. It was made without authority. The power of the committee was given by the statute in order to authorize the Public Printer to make "immediate contracts." It cannot be said that an authority given on March first or second to make an immediate contract, either continues or is exercised in making a contract, as in this case, four months afterwards. (*United States vs. Speed*, 8 Wall., 83; *Emory's Case*, 4 Court Cl., 401; *Thompson's Case*, 9 Court Cl., 201; 15 Op., 253.) It would do violence to the word "immediate" to hold that it can be extended to cover a period of four months. An exigency cannot be presumed to exist, because the statute requires, as evidence of its existence, the assent of the Joint Committee. The law does not presume the continuance of the exigency, because the statute provides that it shall be met by an immediate contract. An assent given on March second cannot be presumed to continue to July second, since it was given for immediate action only. "The law requiring advertisements and proposals for public contracts obviously was intended by Congress to invite competition among bidders, and to prevent favoritism and fraudulent combinations in awarding contracts" (*Harvey vs. United States*, 8 Court Cl., 506; 2 Op. Att. Gen., 259; 10 Op., 262), and, therefore, in order to provide in exceptional cases for exigencies in the public service, when a contract should be made immediately for materials or services, section 3780 of the Revised Statutes gives discretionary authority to the Joint Committee to waive in such cases the general provision of law requiring advertising. A delay of four months is, in the absence of any evidence of the continued assent of the committee to an exigency requiring a contract without advertising, beyond any reasonable purpose of the statute. The Joint Committee could have given no assent after March 4, 1881, because the Forty-sixth Congress expired on that day, and the House of Representatives could have had no members on that committee until the meeting of the Forty-seventh Congress in December, 1881.

The question as to what is an exigency, and the effect of contracts made under statutes of this character, have been considered in many cases. (*Fowler's Case*, 3 Court Cl., 51; *Childs' Case*, 4 *Id.*, 176; *Mason's*

Case, *Id.*, 495; Wentworth's Case, 5 *Id.*, 302; Harvey *vs.* United States, 8 *Id.*, 501; Thompson's Case, 9 *Id.*, 187; McKee's Case, 12 *Id.*, 504, 540; S. C., 97 U. S., 233; Driscoll's Case, 13 Court Cl., 36; Driscoll *vs.* United States, 96 U. S., 421; United States *vs.* Speed, 8 Wall., 83; 15 Op., 243, 256.) The language of the statute, as well as the authorities, regard the "exigency" as one requiring immediate service.

In *Veazie Bank vs. Fenno* (8 Wall., 536), Mr. Chief Justice Chase uses the word "exigencies" in the sense of meaning an immediate pressing necessity; one requiring a resort to unusual powers and efforts. This is evidently the meaning of the same word in section 3780 of the Revised Statutes, which requires "advertisement by the Public Printer, under the direction of the Joint Committee on Public Printing."

If some specified person is ready to make a contract, and none other can be found to perform it, this may constitute an exigency if there be an immediate necessity for the service required to be performed; but if there be no such pressing necessity the statute requires an advertisement for proposals; and, obviously, when a pressing necessity exists, such necessity requires that a contract be made at the earliest convenient and reasonable time. Assuming, what would seem improbable, that when there is ample time for advertisement and no advertisement has been made, these conditions might be decided to be an "exigency," and that the Joint Committee had authorized the contract to be made at any time, still the law has not given such authority to the committee. Time is expressly made an element in the exercise of the power. If the owner of stocks should authorize a broker to sell them immediately, would any court hold that the authority continued four months? The fact that the manuscript was not furnished earlier to the Public Printer cannot change the effect of the statute, nor create an authority which he did not have when he received it.

2. The delay in making the contract is not justified by the fact that the appropriation from which payment was to be made did not become available until July first, because the authority to make the contract was given on March second. As a question of expediency, it may, in the absence of any explanation, be presumed that the contract should then have been made within a reasonable time after the latter date. A contractor who can have four months' time to perform work and prepare engravings before delivery thereof, may often afford to give better terms than if he were required to do similar work on short notice. As a question of law, it would seem that the contract might easily have been made in March for the delivery of the plates on or after July first, following.

The Revised Statutes provide in relation to public contracts, that—

SEC. 3732. No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the War and Navy Departments, for clothing, subsistence, forage, fuel, quarters, or transportation, which, however, shall not exceed the necessities of the cur-

rent year. (*Harvey vs. United States*, 8 C. Cls., 501; *Mason's Case*, Court Cls., 495.)

SEC. 3733. No contract shall be entered into for the erection, repair, or furnishing of any public building, or for any public improvement, which shall bind the Government to pay a larger sum of money than the amount in the Treasury appropriated for the specific purpose.

The joint resolution of March 2, 1881, authorized the publication of the Agricultural Report with its engravings. The statute intrusted the work to the Public Printer. The contract for engravings therefore was, by necessary inference, authorized by the joint resolution. When a duty is imposed by law, the authority to employ all the usual and proper means of executing it is implied, and this includes the necessary contracts in the authorized modes. (*Story, Agency*, sec. 58; *Fowler's Case*, 3 Court Cls., 50.) When an officer is authorized by law to make a contract which is not for the service of any specific year, he may properly do so contingent on an appropriation, and let the contractor take the risk of its being made. If materials be required for a fiscal year not yet commenced, and, prior to such year, there be an existing authority by law to make a contract for such material, it is competent to make a present contract for delivery, and payment at the beginning of or during the fiscal year; but the payment is to be made contingent upon and from such appropriation as is or may be provided. This involves no liability in conflict with section 3679 of the Revised Statutes; and it is the necessary effect of section 3732 of the Revised Statutes. The limitation on the power to contract which is imposed in a class of cases by section 3733, recognizes the general rule. The act of June 22, 1874 (18 Stats., 144), prohibiting the renting of certain buildings until an appropriation therefor shall have been made, recognizes the right of officers, authorized by existing law, to make such contracts, generally, in anticipation of an appropriation. The propriety of such discretionary power must be manifest, as a measure of public necessity and economy. If contracts for supplies for an approaching fiscal year can only be made until after it has commenced, largely enhanced prices may be exacted and great delay may ensue. When the authority to procure supplies or services rests solely on an appropriation act which is to become available for a named fiscal year, commencing after its passage, and there is no other law giving power to make advance contracts for such supplies or services, it may be more difficult to determine what should be done.

The Revised Statutes provide that—

SEC. 3679. No department of the government shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the government in any contract for the future payment of money in excess of such appropriations.

When an appropriation has been made which is to become available at a fixed future day, adequate provision exists for the execution, after the day fixed, of work authorized to be done thereunder, and for con-

tracts for such work. The advertisement for proposals for such work, or even the making of a contract therefor, does not contemplate any liability on the part of the United States, until the appropriation has become available. A strict literal construction of section 3679 might, however, prohibit the making of such a contract prior to the availability of the appropriation; but even such a construction does not forbid taking, before the appropriation has become available, the necessary preliminary steps, such as advertising for and receiving proposals for the making of such a contract when the appropriation becomes available. Such a mode of facilitating the public business is reasonable and expedient. It may frequently be greatly to the interest of the public service, by saving delay, where time is an element of value, to prepare in such a manner for the execution of important work. In the case of the usual necessary supplies for the public service, for which the appropriations annually made do not become available until the first day of July of each year, it is not reasonable to suppose that Congress has forbidden the proper officers of the government from entering into contracts until weeks or perhaps months have elapsed after the necessity for such supplies has arisen, or that advertisements for proposals cannot in such case be made until the first day of July of each year. But it is equally unreasonable to create, by construction, an exigency which will dispense with the wise provision made in respect of advertisements for supplies or services. The requirement as to advertising, and the prohibition in respect of making contracts in excess of appropriations, are each designed for the protection of the public; and it has been held that public contracts which exceed the amount appropriated for the supplies or services contracted for, are void. (Trenton Company's Case, 12 Court Cl., 147; McCollum's Case, 17 Court Cl., 92; 4 Op., 602; 9 *Id.*, 19, 602; Fowler's Case, 3 Court Cl., 44, 50; Curtis' Case, 2 Court Cl., 144.)

Where in any case there is no authority by law to make a contract, or no appropriation which implies such authority, no contract can be made which can impose any liability on the government. This is the necessary effect of the general principles of public policy; and section 3732 of the Revised Statutes is declaratory of these principles and of the common-law rule. (Donovan *vs.* Mayor, &c., of N. Y., 33 New York, 291.)

3. The statutory provisions requiring advertising are not directory, they are mandatory; and hence it must be held in the present case that the so-called contract is void.

It is frequently difficult to ascertain whether a statute was intended to be directory or mandatory as applied to private persons, and no very definite rule has been established. It may be said, generally, that when a statute prescribes a preliminary act, as of the essence of something required to be done thereafter, the requirement in respect of the antecedent act is mandatory; but if the antecedent act be unimportant and not essential the statute is directory. (Sedgwick, Stat. and Const. L., 316.) Thus, a provision for the proclamation of a vacancy in an office, and no-

tice of an election to fill it, is mandatory, and an election held without it is void. (*Ib.*, 316, n.; *McCune vs. Welles*, 11 Cal., 49; *Stayton vs. Hulings*, 7 Ind., 144; *Koch vs. Bridges*, 45 Miss., 247; *Frank vs. San Francisco*, 21 Cal., 668; *Achorn vs. Matthews*, 38 Me., 173; *Veazie vs. China*, 50 Me., 518; *Chapman vs. Inhabitants of Limerick*, 58 Me., 390; *Milford vs. Orono, Id.*, 529.)

The question is one of legislative intent, to be judged of by the language employed, the purpose in view, and the evils to be avoided. In cases like the present one the language of the statute shows that Congress did not intend that a contract should be made without advertising. It says that the committee may authorize the Public Printer to make immediate contracts without advertising. This is equivalent to saying that if the committee do not so authorize, no contract shall be made without previous advertisement. *Expressio unius est exclusio alterius*. And when authority is given to make an immediate contract, and it is not made until several weeks or months have elapsed, it cannot be said that the committee has authorized it to be made without advertisement. The purpose of the statute, its whole policy, will be defeated if the provision requiring advertising may be disregarded in cases like the present one. The evils to be guarded against require the language of Congress to be respected and obeyed as mandatory, in order to prevent favoritism and fraudulent combinations. The public interest requires free competition in bids for public contracts, and that all parties shall have an open, honest, and equal opportunity to share in the benefits of public work. The authorities show that the statute is to be construed as mandatory. (*Sedgwick, Stat. and Const. L.*, 316, 317; *Hogan vs. Devlin*, 2 Daly, 184; *Hines vs. Lockport*, 5 Lansing, 16, 21; *People vs. San Francisco*, 36 Cal., 595; *Henderson's Case*, 4 Court Cl., 75; *Emery & Blake's Case, Id.*, 401; *Supervisors vs. United States*, 4 Wall., 435; *City of Galena vs. Amy*, 5 *Id.*, 705; *Davidson vs. Gill*, 1 East, 64; *Malcom vs. Rogers*, 5 Cow., 188; *Mayor vs. Furze*, 3 Hill, 612; *Rex vs. Blackwold*, 2 Chitty, 251; *Rex vs. Barlow*, 2 Salk., 609; *Vern.*, 154.)

4. The reasons generally assigned for regarding the duty to advertise as directory only are not well founded.

The duty of officers executing similar statutes requiring advertisement has been repeatedly affirmed. (*Berrien*, August 29, 1829, 2 Op., 259; *Crittenden*, July 13, 1852, 5 Op., 566; *Devens*, May 3, 1877, 15 Op., 255.) The right to rescind executory contracts made without advertising has been asserted by the Attorneys-General. (6 Op., 406; 15 Op., 255.) But it was said by Attorney-General Bates that "after a party has entered into a contract with the government in good faith [without the advertisement required by law] and has so far performed his part of the same, that to rescind it, or declare it illegal, and so incapable of execution, would subject him to loss and injury, whilst the government would yet enjoy the benefits of his labor or expenditure, the contract cannot be avoided or changed to the injury of the other

party by the government." (10 Op., 416, 423.) Attorney-General Devens held that in such case the contract is obligatory on the United States, so far as it may have been executed; but that so far as it is executory and unperformed, it may be rescinded. (15 Op., 23, 255, 419, 484.) And it has been further held in this class of cases that "a contract made without due advertisement is not valid and binding upon the government; and that the fact that the contractor made in good faith expenditures to enable him to perform the same does not give it validity." (Phillips, Solicitor-General, approved by Pierrepont, March 20, 1876; 15 Op., 539.) And a decided disapproval was expressed in this opinion of the doctrine previously announced by Attorney-General Bates (10 Op., 416), that although a statute requiring advertising "has been disregarded, yet if the contract has been partially performed, it cannot be deemed void, but must be executed according to its terms." The opinion that a contract partially executed could not be rescinded by the government was founded upon the maxim, *fieri non debet, sed factum valet* (10 Op., 423), and upon "the magnitude of the injustice which such an application of the law [asserting a right to rescind] would work." (See 14 Op., 577.)

In such a conflict of views, it must be conceded that there can be nothing authoritative in the opinion cited, and that the statement once made, that an opinion is "only advisory," and that officers "are free to follow" their "own convictions" (5 Op., 566, Crittenden, July 13, 1852), was not entirely out of place. Besides this, the First Comptroller is required to make a *decision* which, when rendered, is "conclusive on the executive branch of the government" (Rev. Stat., 191), and he cannot turn his responsibility over to other officers.

There are several classes of public contracts as to which various questions arise in respect of their validity. Among these the following may be mentioned:

- i. Contracts made without any authority of law.
- ii. Contracts made in violation of a statute or against public policy.
- iii. Contracts by subordinate officers requiring the assent of superior officers.
- iv. Contracts required to be made in writing.
- v. Contracts assigned in violation of law, and performed in whole or in part by assignees.
- vi. Contracts made under a statute requiring advertisement and letting to the lowest bidder.

These questions would generally arise on one or other of the following points: (1) As to the original validity of the contract; (2) as to the rights of parties before any performance; (3) as to the right of the government to rescind after part execution of the contract, and (4) as to the rights of parties after part or full performance of the contract.

There are some well-settled principles which are generally pertinent to these questions.

(a.) The government is not estopped from denying the validity of the

unauthorized acts of its officers. (*Filor vs. United States*, 9 Wall., 45; S. C., 3 Court Cls., 45; *Parish vs. United States*, 8 Wall., 489; *Trenton Co. Case*, 12 Court Cls., 147; *Emery's Case*, 4 Court Cls., 402.)

(b.) Officers cannot generally waive the rights of the United States, or dispense with a requirement of law. (*Andreae vs. Redfield*, 98 U. S., 225; S. C., 12 Blatchf. C. C. 407.)

(c.) Every person is bound, at his peril, to know the extent of the authority of public officers. (Story, Agency, 307 *a.*, 314, 126, 133, 134; Burroughs on Public Securities, 5; *The Floyd Acceptances*, 7 Wall., 666; S. C., 7 Court Cls., 72; *Whiteside vs. United States*, 93 U. S., 257; S. C., 12 Court Cls., 24; *Lee vs. Munroe*, 7 Cranch, 306; *McDonald vs. Mayor*, 68 New York, 23; *State vs. Hays*, 52 Mo., 578; *State vs. Bank Mo.*, 45 Mo., 528; *Mayor vs. Reynolds*, 20 Md., 10; *People vs. Bank*, 24 Wend., 431; *Pierce's Case*, 1 Court Cls., 270; *Henderson's Case*, 4 Court Cls., 75; *Emery's Case*, *Id.*, 402; *Thompson's Case*, 9 *Id.*, 188; *Trenton Co. Case*, 12 Court Cls., 147; *McKee's Case*, *Id.*, 552; *McCollum's Case*, 17 Court Cls., 92.)

The rights of the parties are to be considered with these principles in view, in each of the classes of contracts named. And although a contract under one only of the enumerated classes is now under consideration, the principles generally applicable to the others throw light upon the present contract.

I. Contracts made without authority of law are void. (*The Floyd Acceptances*, 7 Wall., 666; *Whiteside vs. United States*, 93 U. S., 253; *McDonald vs. Mayor*, 68 New York, 23; *Thompson's Case*, 9 Court Cls., 201.) And, generally, a void contract is "ineffectual to fix any liability upon the government." (*Filor vs. United States*, 9 Wall., 48.)

II. Contracts made in violation of law are generally void. (2 Chit. Cont., 11 Am. ed., 1000-1005; *Bank United States vs. Owens*, 2 Pet., 527; *Groves vs. Slaughter*, 15 *Id.*, 472; *Creath vs. Sims*, 5 How., 192; *Harris vs. Runnels*, 12 How., 79; *Kennett vs. Chambers*, 14 How., 39; *Thomas vs. City of Richmond*, 12 Wall., 355; *McDonald vs. Mayor*, 68 New York, 23; *Emery's Case*, 4 Court Cls., 402; 1 Pars. on Contracts, 458; Sedgwick, Stat. and Const. L., 2d ed., 69-74, 338-341.)

III. In some cases contracts can only be made by subordinate officers subject to the approval of some superior officer. Contracts not so approved generally impose no liability on the United States, unless there be a subsequent authorized ratification. (*Filor vs. United States*, 9 Wall., 45; *Parish Case*, 12 Court Cls., 609; S. C. 100 U. S., 500; *Whiteside vs. United States*, 93 U. S., 248; S. C. 12 Court Cls., 24; *Wilcox vs. Jackson*, 13 Pet., 513; *McElrath's Case*, 102 U. S., 436; S. C. 12 Court Cls., 201; *United States vs. Eliason*, 16 Pet., 302; *The Confiscation Cases*, 20 Wall., 109; *McCollum's Case*, 17 Court Cls., 92; *Seward's Case*, 2 Lawrence, Compt. Dec., 63.)

Where, with the full knowledge of the facts concerning it, a person ratifies an agreement which another person has improperly made, con-

cerning the property of the person ratifying, the latter makes himself a party to the agreement as fully as if he had made the original agreement; and no new consideration is required to support the ratification. (*Drakely vs. Gregg*, 8 Wall., 267.)

Although this doctrine is well settled, it does not apply to public contracts; because, obviously, no officer or agent of the government has authority to ratify a contract which, in law, is regarded as an improper one, because of the omission to observe some substantial requirement of law in making it; as, for example, the omission to advertise for proposals in order that the contract might have been awarded to the lowest bidder.

IV. It is settled that a statute which requires a public contract to be reduced to writing, is mandatory; and hence, that executory contracts not reduced to writing, cannot be enforced. But a party who renders services under such contract, or who furnishes supplies to the government, is entitled to payment, as upon a *quantum meruit*, or *quantum valebant*, unless the contract be void as against law or public policy. (*Contract-Assignment Case*, 2 Lawrence, Compt. Dec., 472.) But this is upon the ground that as to such contracts the government occupies, in most respects, the same position as a private party, when performance takes a case out of the statute of frauds, and where effect should be given to the contract, because the officer or agent acting for the government had authority to make a valid contract, and to accept the services rendered or supplies delivered. (See Acts of June 2, 1862, 12 Stats., 411; July 16, 1798, 1 Stats., 610; February 27, 1877, 19 Stats., 249; Rev. Stats., 3743, 3744; *Clark County vs. United States*, 95 U. S., 769; *Salomon vs. United States*, 19 Wall., 17; *Slater vs. Emerson*, 19 How., 224; *Emerson vs. Slater*, 22 How., 42; *Lyon vs. Bertram*, 20 How., 149; *Whiteside vs. United States*, 93 U. S., 250; *Henderson's Case*, 4 Court Cls., 75; *Lindsley vs. United States*, *Id.*, 359; *Burchiel vs. United States*, 4 *Id.*, 549; *Bernheimer's Case*, 5 *Id.*, 65; *Jones' Case*, 11 *Id.*, 733; *Buffalo B. R. R. Case*, 16 *Id.*, 239; *McCollum's Case*, 17 *Id.*, 92; *Burroughs on Public Securities*, 510; *Louisiana vs. Wood*, 102 U. S., 298; *Marsh vs. Fulton, Co.*, 10 Wall., 676; *Watson vs. Turner*, Bull. N. P., 147; 1 Selwyn, N. P., 50 n.)

The performance which takes cases in which the government is concerned, out of the statute of frauds, applies only to such contracts as would be valid if in writing, not to such contracts as this, which is void for want of authority either to make or ratify it. (See *McDonald vs. Mayor*, 68 New York, 28.)

V. When a public contract has been assigned in violation of the statute, and the assignee has furnished the supplies required by it, it has been held that he is entitled to payment as upon a *quantum meruit*. (Act July 17, 1862, 12 Stats., 596; Act May 17, 1878, 20 Stats., 62; Rev. Stats., 3737, 2106, 3963; *Wheeler's Case*, 5 Court Cls., 504; *Wanless' Case*, 6 *Id.*, 126; *Francis' Case*, 11 *Id.*, 640; *Mason's Case*, 14 *Id.*, 59;

Field's Case, 16 *Id.*, 434; Buffalo B. R. R. Co. Case, *Id.*, 239; Campbell *vs.* Dist. Columbia, 2 MacArthur, 536.) But there are cases which hold that a contract which is in direct opposition to, and in fraud of the law, can give no right of action against the United States, either on the contract, or for a *quantum meruit* or *quantum valebant*; and that, on grounds of public policy, the liability of the government does not rest precisely on the same principles which apply as between private citizens. (McDonald *vs.* Mayor, 68 New York, 23; Contract-Assignment Case, 2 Lawrence, Compt. Dec., 472.) The principles applicable in this class of cases are hereinafter stated. The right to a *quantum meruit*, in this class of cases, is not defeated upon the ground of the want of power in officers of the government to make an original contract for the services or supplies, or to bind the government in an implied contract by acceptance of the service, or by receipt and use of the supplies. Where such acceptances and use are authorized and totally disconnected from an illegal contract, or an illegal assignment of a legal contract, the right to compensation would seem to be clear. But a party who, as assignee of a contract, furnishes supplies, solely by virtue of the assignment, has a claim which, at its inception, is in opposition to and in fraud of the statute, which prohibits such assignments. To allow such a claim would be to defeat the whole policy and purpose of the statute, and to that extent to prejudice the public service. The taint of illegality cannot be severed from the transaction; and payment of the claim would be a premium for the disregard alike of statutes and contracts. (Armstrong *vs.* Toler, 11 Wheat., 258, 278; Groves *vs.* Slaughter, 15 Pet., 474; 1 Pars. Cont., 455.)

VI. There are sundry statutes requiring advertisements before the making of contracts, some of which provide that in cases of exigency, certain officers may dispense with the advertising. (Act March 2, 1861, 12 Stats., 220; Rev. Stats., 3709, 3716, 3718, 3721, 3724, 3726, 3729, 3767, 3768, 492, 3765, 3780, 3827, 3941, 4667, 3957.) It is well settled that when an officer is authorized to dispense with advertising, and he has done so in the exercise of his discretion, and made a contract for the public service without advertising, the validity of the contract cannot be made to depend on the wisdom or skill which may have accompanied the exercise of the discretion. (United States *vs.* Speed, 8 Wall., 83; Cobb's Case, 7 Court Cls., 470; Thompson's Case, 9 *Id.*, 188; P. & T. R. R. Co. *vs.* Stimpson, 14 Pet., 448; Allen *vs.* Blunt, 3 Story, 742; Wilkes *vs.* Dinsmore, 7 How., 89.) Cases have already been cited as to the meaning of the word "exigency," and they show, to some extent, the effect upon a contract made when no exigency exists. In Driscoll's Case (13 Court Cls., 36), Richardson, J., delivering the opinion of the court, said, in respect of public contracts made without the advertisement required by statute, that "at most the contract was only voidable;" but the language quoted cannot be regarded as authoritative, as judgment in this case was reversed in the Supreme Court on another point of law,

and this point was not considered. (*United States vs. Driscoll*, 96 U. S., 424.)

If the contract, in this case, was absolutely void, no liability against the United States arises under it. If it was only voidable, not having been avoided, a liability against the United States exists under it. But it is void, because the authority of the Public Printer to make it depended (1) upon a previous advertisement, or (2) on the assent by the joint committee at the time the contract was made to dispense with advertising. As neither of these conditions precedent existed, the authority to make the contract never vested in the Public Printer. It has been shown that the statute requiring advertisement before making a public contract is mandatory; it therefore follows that no contract can be valid without advertisement, unless in the case of an exigency which affords no time for advertisement.

The contract under consideration was never ratified, because no officer had authority to ratify it; and even if it had been ratified, the government is only bound by the authorized acts of its agents.

VII. Is the government liable as upon a *quantum valebant*? It is clear there is no such liability: First, because the contract was originally void, and has never been assented to or ratified by the government; and, second, because the claimant, having assented to a contract in violation of the statute and public policy, is not in a position to ask relief.

1. The United States is a great public political corporation. It can only act by its duly authorized officers or agents, and these officers and agents cannot exceed their authority, either in making contracts, in assenting to or ratifying any irregular or illegal act, or in consenting to receive and pay for goods furnished. (*Whiteside vs. United States*, 93 U. S., 257; *S. C.*, 12 Court Cl., 24; *Hunter vs. United States*, 5 Pet., 188; *United States vs. Cheneweth*, 6 McLean, 139; *The Floyd Acceptances*, 7 Wall., 666; *s. c.*, 7 Court Cl., 68, 72; 1 Court Cl., 270; *McElrath vs. United States*, 12 Court Cl., 216; *McKee's Case*, 12 Court Cl., 552; *Hodgson vs. Dexter*, 1 Cranch, 345; *McCollum vs. United States*, 17 Court Cl.; *Wilder vs. United States*, 16 Court Cl., 542; *Fraser vs. United States*, 16 Court Cl., 515.)

The government cannot be held liable for goods furnished, unless by previously authorized express or implied contract, or by subsequently authorized assent; for, "ordinarily, no man can make himself the creditor of another by any act of his own unsolicited and purely officious." (2 Greenl. Ev., 107; 1 Pars. Cont. (6 ed.), 446; 1 Roll. Abr., 11, pl. 1; *Hunt vs. Bate*, Dyer, 272 *a.*; *Hayes vs. Warren*, 2 Stra., 933; *Roscorla vs. Thomas*, 3 Q. B., 234; *Jeremy vs. Goochman*, Cro. Eliz., 442; *Dogget vs. Vowell*, Moore, 643; *Hines vs. Butler*, 3 Ired. Eq., 307; *People vs. Supervisors*, 3 Abbott, Court Appls. N. Y., 560; *S. C.* 23 How. Pr. 89; *Frear vs. Hardenberg*, 5 Johns., 273; *Bartholomew vs. Jackson*, 20 Johns., 28; *Jennings vs. Brown*, 9 M. & W., 501; *Eastwood vs. Kenyon*, 11 Ad. & El., 438; *Atkins vs. Banwell*, 2 East, 505; *Wing vs. Mill*, 1 B. & A.,

104; 22 American Jurist, 2; United States *vs.* Macdaniel, 7 Pet., 19.) To hold otherwise, "would place the government at the mercy of all its agents and officers." (Pierce's Case, 7 Court Cls., 73.) If a party volunteer to pay taxes not yet due which have been assessed upon the land of another, without the sanction or approval of the party assessed, the latter cannot be held liable by the former, notwithstanding the pecuniary benefit thereby received.

In this case there was no authorized contract, as already shown. And there has been no authorized ratification of, or assent to the unauthorized contract, or to the receipt and use of the engravings furnished. The United States can only be made liable in the form it has authorized. The law, which is the power of attorney under which the Public Printer acted, gave but one mode to create a liability. The form by which he could bind the United States was clearly prescribed. This, by necessary implication, excluded his right to bind the United States in any other. But it is not necessary to resort to this implication. There was an absence of authority to bind the government by the contract which he, in form, made. There has been no authorized ratification.

The receipt of the printed matter by the Public Printer is not a ratification of the original contract; because he had no authority to so ratify it. Such receipt creates no implied contract or liability, because the Public Printer had no authority to make in this form an express contract, much less an implied one. He was not authorized to receive or use the printed matter furnished by the claimants, because the law prescribed another, a different, and the only mode by which he was authorized to procure it. It has, indeed, been used for the benefit of the United States, but against its expressed will, and in violation of law.

The government may be bound in the same forms as private parties, by its officers, when they are authorized to enter into a contract without the formality of advertising. Similarly when they are authorized to receive and use goods, the government may be bound therefor. (Salomon *vs.* United States, 19 Wall., 17; Gibbons *vs.* United States, 5 Court Cl., 416; S. C., 8 Wall., 269; Whiteside *vs.* United States, 93 U. S., 256; Jones' Case, 11 Court Cl., 736, 744; Lindsley's Case, 4 *Id.*, 360; Burchiel's Case, *Id.*, 549; Wheeler's Case, 5 *Id.*, 504; Wanless' Case, 6 *Id.*, 123.) Where there is no authorized contract express or implied, and there has been no authorized use of the printed matter, but on the contrary a clear violation of law in all that has been done, no *quantum valebant* can arise. It has been shown that the original contract was void because of want of advertisement, void for want of power to make it, void as against the language of the statute, void as against its policy, hence any attempt to ratify it without authority must be equally void. The power to ratify an agreement can only exist when there is an original power to make it. (Burroughs on Public Securities, 508; Whiteside *vs.* United States 93 U. S., 253; United States *vs.* Shoemaker, 7 Wall., 341; McDonald *vs.* Mayor N. Y., 68 N. Y., 26; Mayor *vs.* Ray, 19 Wall.,

484; *Louisiana vs. Wood*, 102 U. S., 298; *State vs. Delafield*, 8 Paige, 527; S. C., 2 Hill, 159; S. C., 26 Wend., 238; *Jones' Case*, 11 Court Cl., 734; see *Campbell vs. Dist. Columbia*, 2 MacArthur, 537.)

Congress alone can create a public liability when there has been no authority given by law to make a contract. (*Delafield vs. State of Illinois*, 2 Hill, N. Y., 160.)

2. The maxim cited in 10 Opinions, page 423,—*Fieri non debet, sed factum valet*:—It ought not to be done, but when done it is valid, has no application here. (5 Coke, 39; 1 Strange, 526; 19 Johns., N. Y., 84, 92; 12 *Id.*, 11, 376.) This maxim applies as between private persons whose acceptance of work may operate as a ratification of a previous informal contract or by way of estoppel, or raise a new implied contract. (*Lyon vs. Bertram*, 20 How., 149; *Emerson vs. Slater*, 19 How., 224; s. c., 22 How., 28; *Swain vs. Seamaus*, 9 Wall., 254; *Marsh vs. Fulton County*, 10 Wall., 676; *Bronson vs. Chappell*, 12 Wall., 681; *Burroughs on Public Securities*, 508; *Louisiana vs. Wood*, 102 U. S., 298.) But when, as in this case, a contract has been made without authority, the attempt to ratify it, or bind the United States by an acceptance of the work done, would be equally without authority. A ratification can only be made by an officer having power to make the contract in the form required for the original contract. Some statutory requirements must “precede the reception of the material.” (*McDonald vs. Mayor*, 68 New York, 26.) In *Marsh vs. Fulton County* (10 Wallace, 676), it appeared that county bonds had been issued without authority, and it was claimed that they had been ratified by the supervisors of the county. The court said: “The supervisors possessed no authority to * * * issue the bonds * * * without the previous sanction of the * * * voters of the county. * * * They could not, therefore, ratify a subscription [issue of bonds] without a vote of the county, because they could not make a subscription in the first instance without such authorization.” (*Allen vs. Louisiana*, 103 U. S., 86; *Hunter vs. Field*, 20 Ohio, 340.) As the United States could not be charged with a liability without its assent, and as there has been no authorized assent, the claimant can have no relief.

3. “The magnitude of the injustice” in refusing to pay for goods appropriated to the use of the government, seems to have been relied on to support the right to a *quantum meruit*. (10 Op., 423.) But this view of the case substitutes a supposed injustice for statutory authority in order to supply the absence of a requirement of law by supporting a violation of law. If there be any injustice in such a case, Congress is the proper tribunal to appeal to. The discretion of executive officers is not a safe substitute for an act of Congress. While it is their duty to be careful of the rights of citizens, it is not safe for them to overlook the magnitude of the injustice which would be done to the public by giving to a direct violation of law the effect of an act authorized by law. It is better that one man, or many men, should suffer loss, than to establish

a rule which would permit favoritism, fraudulent combinations, and corruption to an unlimited extent. Public morals may suffer more by official disregard of law, than by personal pecuniary loss. *Salus populi suprema lex.*

4. The conclusion reached is supported by many principles and authorities besides those stated. A void contract is "ineffectual to fix any liability upon the government." (Filor's Case, 9 Wall., 48.) "No recovery can be had for value parted with upon an illegal contract." (Peck vs. Burr, 10 New York, 294.) "Clearly, if an act of Parliament expressly prohibit the transaction in respect whereof an agreement is entered into, such agreement will be invalid." (2 Chit. Cont., 11 Am. ed., 1003; Sedgwick, Stat. and Const. L., 2d ed., 69-74, 338-341; Thomas vs. City of Richmond, 12 Wall., 349; State vs. Hastings, 12 Wisc., 596; Goodrich vs. Moore, 2 Minn., 61; Lardner's Case, 7 Court Cls., 530; Thompson's Case, 9 Id., 187; Shaver's Case, 4 Id., 440; Mosher vs. Independent School District, 44 Iowa, 122; Agawam National Bank vs. South Hadley, 21 Albany L. J., 516, April, 1880; Gause vs. City of Clarksville, 19 Id., 253; Burroughs' Public Securities, 287, 507; Cundell vs. Dawson, 4 C. B., 376; Little vs. Poole, 9 B. & C., 192; Bensley vs. Bignold, 5 B. & Ald., 335; Stevens vs. Robinson, 2 C. & J., 209; Ex parte Dyster, 2 Rose, Bank. Cas., 34, 349.) The case of McDonald vs. Mayor of New York (68 N. Y., 23) is instructive, its reasoning convincing, and its logic conclusive. It was an action brought to recover the value of gravel and stone sold and delivered to the city in 1869 and 1870 at the request of the superintendent of roads, and used in making streets. The statute was not complied with which required contracts for materials to be made by the head of the street department, upon sealed bids, in compliance with public notice advertised pursuant to an authority to purchase given by the Common Council. It was the duty of the city to keep the streets in repair; and the superintendent was charged with carrying this duty into effect, and he certified the bills as correct. Folger, J., in denying the right of the claimant to recover, said of the statutes referred to in that case, that they "are fitted to insure official care and deliberation, and to hold the agents of the public to personal responsibility for expenditure; and they are a limit upon the powers of the corporation, inasmuch as they prescribe an exact mode for the exercise of the power of expenditure." And, commenting on the claim of the plaintiff to recover upon a *quantum meruit*, because the city, having "appropriated the materials * * * is bound to deal justly and pay him the value," he said: "If the restriction put upon municipalities by the legislature for the purpose of reducing and limiting the incurring of debt, and the expenditure of the public money, may be removed upon the doctrine now contended for, there is no legislative remedy for the evils of municipal government. * * * Restrictions and inhibition by statute are practically of no avail if they can be brought to naught by the unauthorized action of every official of lowest degree acquiesced in or not repudiated by his

superiors." (Donovan *vs.* Mayor, 33 N. Y., 291; Peterson *vs.* Mayor, 17 N. Y., 449.) An able writer says: "If the act done is contrary to the express policy of the state * * * contracts in violation of that policy are simply void, and neither party to the contract will be heard in a court where they seek to be reimbursed for moneys expended in violation of the laws. * * * In such a case the court simply withholds its hand and leaves the parties to the illegal contract where they have placed themselves by their own volition." (Burroughs, Public Securities, 511.)

5. The claimant cannot recover because he is a party to a contract made in violation of law.

It is true that there are cases in which the United States was held liable upon implied contracts, or upon ratified informal or irregular contracts, and also upon parol contracts which should have been in writing. But these were cases in which the claimant did not violate the prohibition, or general public policy, of the statute. That an illegal or immoral consideration renders a contract void, and that courts will not aid in enforcing such contracts, is well settled. *Ex turpi causa non oritur actio.*—*Ex dolo malo non oritur actio.* But the rule, at least as to contracts made for the government, goes further. If such a contract be made in violation of "restrictions and inhibitions" prescribed by statute "for the purpose of reducing and limiting the expenditure of the public money," or of limiting the power of officers by requiring conditions which are plainly made the essence of the authority to exist before its exercise, contracts in violation of such statute are void. (McDonald *vs.* Mayor, 68 New York, 23.) *Ex maleficio non oritur contractus.*—*Ex pacto illicito non oritur actio.* (Broom, Leg. Max., 666.) Thus, in Harris *vs.* Runnels (12 Howard, 84), it is said that "when the statute is silent [as to penalty or invalidity] and contains nothing from which the contrary can be properly inferred, a contract in contravention of it is void. * * * The law will not aid either of two parties who are in *pari delicto*, in the violation of a statute. * * * The rule is not allowed for the benefit of either party to an illegal contract, but altogether upon grounds of public policy." In Grooves *vs.* Slaughter (15 Peters, 471) it is said of contracts prohibited by statute, that "whenever the object of a prohibition is to protect the public and not one for purposes of revenue, or some regulation connected with the execution of municipal laws, there can be no recovery by a person who has committed an act at variance with the prohibition, whether the act be the particular thing forbidden or not. * * * No plaintiff will receive the aid of the court in prosecuting his claim where it is founded on a violation of the law, or an act contrary to public policy."

When a contract is made, and only one party to it violates a statutory prohibition, it may be valid in favor of the party not in fault. But when both parties to a contract in making it violate a statute enacted to prevent fraud in the public service and protect the public interests, the

contract is void, and a court will not aid either to enforce it. Section 3780 of the Revised Statutes made it unlawful for the claimant to enter into the contract now in question, because he was not "the lowest and best bidder." He, as fully as the Public Printer, acted in violation of the statute. He is therefore, on principles of public policy and law, entitled to no relief from either the executive or judicial branches of the government. (1 Pars. Cont., 458; Chitty, Cont., 11 Am. Ed., 1001; *Armstrong vs. Toler*, 11 Wheat., 278; *Kennett vs. Chambers*, 14 How., 39; *Thomas vs. City of Richmond*, 12 Wall., 355; *Sprott vs. United States*, 20 Wall., 459; *Cope vs. Rowland*, 2 Crompt. Mee. & Ros., 157.)

No fact is presented which raises any doubt of the good faith of the able officer who made the contract in question, or of the reputable contractors who are now the claimants. But on legal principles no payment can be made. Congress will, no doubt, give all proper relief in the matter.

The claim is disallowed.*

TREASURY DEPARTMENT,

FIRST COMPTROLLER'S OFFICE,

February 27, 1882.

IN THE MATTER OF COMPENSATION OF A MARSHAL OF THE UNITED STATES HOLDING OVER AFTER THE EXPIRATION OF HIS TERM OF OFFICE.—EVANS'S CASE.

1. A marshal of the United States holding over after the expiration of his term of office, and performing its duties, is not entitled to payment from the United States of the fees and compensation prescribed by statute for services rendered to the government.
2. A party who acts for the government without authority of, or in violation of, law, cannot from his own wrong create a valid claim to compensation when there is no subsequent authorized assumption to pay, ratification, or assent.
3. No court or officer is authorized to ratify the acts of a marshal holding over after the expiration of his term, so as to charge the United States with a liability to pay compensation for services.
4. The acts of a *de facto* officer are valid in so far as they affect the public, or third persons who have an interest in them.
5. Hunter's case (1 Lawrence, Comptroller's Decisions, 151) distinguished in principle from those cases which adopt the general rule that a *de facto* officer is not entitled to fees or compensation.

Samuel P. Evans was commissioned as marshal of the United States for the eastern district of Tennessee for four years from the 16th day of March, 1877. The Senate was in session on the 16th of March, 1881,

* The private act, chapter 86, approved April 21, 1882, "authorizing the Public Printer to pay A. Hoen and Company, of Baltimore, Maryland, for the lithocautic illustrations made by them" (22 Stats., private laws, page 9), recognizes the correctness of this decision.

when his term expired, and so continued until after May 19. His successor was appointed in May, and the confirmation by the Senate was May 19, 1881. May 31, 1881, his successor was qualified and took possession of the office.

Marshals for the Territories hold their offices for four years, and until their successors are appointed and qualified. (Rev. Stat., 1876.) But all marshals except those in the Territories are appointed for four years only. (Rev. Stat., 779.) And when their terms expire, they are authorized to execute all such precepts as may be in their hands. (Rev. Stat., 790.)

In case of a vacancy in the office of a marshal within any circuit, the circuit justice of such circuit may fill the same, and the person appointed by him shall serve until an appointment is made by the President and the appointee is duly qualified, and no longer. (Rev. Stat., 793.)

When the term of Mr. Evans expired, the circuit justice who had been assigned to his circuit was retired, and a successor had not been designated, so no appointment could be made. During the period from March 17 to May 30, inclusive, Mr. Evans and his deputies continued to execute the processes of the courts and to attend their sessions. Accounts for the services so performed have been approved by the proper court (Rev. Stat., 846; act February 22, 1875, 18 Stat., 333), and are now submitted to the First Comptroller. The question to be decided is, whether Mr. Evans is entitled to be paid by the United States the fees of the office, or to compensation for the services rendered by him during the period from March 17 to May 30, inclusive (*Best vs. Polk*, 18 Wall, 112; 7 Op., 303), other than on process in his hands when his term of office expired. His services were well performed, were valuable to the government, the office would have been vacant if he had not continued to serve, no objection was made from any source to his action, and it was sanctioned by the court and the public generally.

Hon. E. C. Camp, of Knoxville, Tenn., for claimant.

1. The services were public, essential, and necessary.

2. The government having accepted the benefit of the services, public policy and the interests of the community require that they may be deemed valid, as of those of an officer *de jure*. Equity and good faith impose an obligation to pay, as on an implied contract (*Curtis' Case*, 2 Court Cl., 144; *Fremont Case*, *Id.*, 461; *Johnson's Case*, 4 *Id.*, 288). In *Kimball vs. Alcorn*, 45 Miss., 15, the court say: "Silence of the government is a ratification of the acts of a *de facto* officer, but not of his title" (7 Op., 303; *Embry vs. United States*, 100 U. S., 680; *Merriam vs. Clinch*, 6 Blatchford, 5; *Commissioners vs. Mayor*, 1 Seld., 285; 5 Op., 765; *Bendit vs. Auditor, &c.*, 20 Mich., 176).

3. Evans, as an officer *de facto* under color of title, should be paid (1 Gilman, Ills., 523; 69 Ills. R., 523; 82 Ills. R., 298; 75 Ills. R., 561; 66 Ills., 75; 4 Minn., 59; 14 *Id.*, 232; 17 *Id.*, 451; 12 *Id.*, 538; *Cooper vs.*

Moore, 44 Miss., 386; Kimball *vs.* Alcorn, 45 *Id.*, 151; Leachman *vs.* Musgrove, *Id.*, 537; Cross *vs.* Harrison, 16 How., 164).

4. No other person does or can claim compensation.

—
DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

Samuel P. Evans was a marshal *de jure* of the United States for the eastern district of Tennessee for four years from March 16, 1877. After his term of office expired, on the 16th of March, 1881, he "held over" and continued to exercise the powers and perform the duties of the office without authority of law from March 17 to May 30, both days inclusive, and now asks payment from the United States of the fees and compensation prescribed by statute for services rendered to the government. His claim is that during the period last mentioned he was a *de facto* officer, and having rendered service is entitled to compensation.

No stronger claim, *ex æquo et bono*, could be presented; and if the First Comptroller were invested with a discretion to make payment founded on principles of abstract justice as applied to the circumstances under which services were rendered, and without reference to fixed principles of law, or consequences resulting generally, the claimant would be paid.

Cases adjudicated by courts can rarely be satisfactory, except as they rest on principle, and to that test the claim now made is to be brought; and judged by this it cannot be paid. It is well settled that a mere volunteer who thrusts his services upon another unsolicited cannot recover of the latter compensation therefor, when there is no subsequent promise to pay, ratification, or assent. (1 Pars. Cont., 6th ed., 446; 2 Greenl. Ev., 107; Exigency Case, *ante*, 92.) So a party who acts for the government, without authority or in violation of law, cannot from his own wrong create a valid claim to compensation, however beneficial his services may be, when there is no subsequent authorized assumption to pay, ratification, or assent. (*Id.*) The government can only act, or be made liable to pay compensation for services by officers, agents, or employés duly authorized. (*Id.*) Public policy forbids compensation for services rendered in violation of law. (*Id.*) Applying these principles, they are, and each one of them is, conclusive against the claim now made. The claimant volunteered his services without request or authority of the government. The office of marshal is established by law (Rev. Stat., 776), and the appointment of marshals not having been vested by Congress "in the President alone, in the courts of law, or in the heads of departments," is vested in the President by and with the advice and consent of the Senate (Const., Art. 2, sec. 2). The claimant was not thus appointed. He came unsolicited by any power authorized to request him to act; he was a mere volunteer. He acted without authority of law. He acted in violation of law.

There has been no authorized ratification of, or assent to, or promise to pay for, the services rendered. No power can be exercised for the government except in pursuance of law (Floyd Acceptances, 7 Wall., 666), and no representative of the United States has been invested with authority to give such sanction. The proper court has "examined and certified" (Rev. Stat., 846; act of February 18, 1875, 18 Stat., 318; act February 22, 1875, 18 Stat., 333), and thus approved the account of the claimant for services. But the court had no authority to ratify the action of the marshal or to promise that the government would pay for the services rendered. The statute requires the proper court to "examine and certify" the account merely as evidence that the services were performed, and that the charges therefor are not in excess of the rates authorized by statute, but not to settle any question of title to the office, or ultimate right to payment as affected by want of such title. This is sufficiently shown by the language and manifest purpose of the statute even without the provision declaring that the accounts thus approved "shall then be subject to revision upon their merits by the accounting officers, as in the case of other public accounts." (Rev. Stat., 846.)

Considerations of public policy forbid payment to the claimant. While it may be presumed the appointing power will promptly fill vacancies in office, public policy requires that no inducement shall be held out to omit or delay appointments. If the incumbent of an office may hold over after his term of office expires, and receive the compensation fixed by law, it would enable the appointing power to keep in office men whose appointment the Senate would not advise, and without their consent. It would defeat the purpose of the Constitution. It would be an inducement to persons so holding over to throw obstacles in the way of surrendering office to successors duly appointed. If the right to compensation be recognized after the expiration of a term, and before a successor is appointed, it will be difficult on principle to deny it after such appointment, and up to the time possession of the office is taken under it. This would be an inducement for officers to hold over and resist the right of new appointees to obtain speedy and rightful possession.

It was at one time held that, by reason of the exigencies of the public service requiring the performance of the duties of administrative officers, such officers must be considered as holding their offices until their successors shall be duly appointed and qualified, notwithstanding the limitation of the term of office by statute to four years. (2 Op. Attys. Genl., 713.) But this opinion has been overruled. (11 Op. Attys. Genl., 287.)

Thus, it has been said:

"Upon the whole, I think that, as regards offices established under the Government of the United States, the right of the incumbent of an office to continue therein after the expiration of his term until the ap-

pointment of his successor, depends altogether on whether Congress has provided that he may so continue; and that where the legislature has not authorized the officer to hold over, his incumbency ceases at the end of his term." (14 Opin. Attys. Genl., 263.)

Pension agents hold office for the term of four years, and until their successors are appointed and qualified. (Rev. Stat., sec. 4778.)

In many cases the term of office is fixed and the authority of the officer ceases with its expiration.

General provision is made for such exigencies in the public service by the power granted to the President or other authorized officer to fill vacancies. This power is to be considered as always *in esse*, and capable of being exercised. It is the duty of the President or other officer to fill all vacancies when the necessities of the public service require the performance of the duties of the office. If the Senate is in session, its advice and consent is necessary in certain cases. If the Senate is not in session, the President or other officer has power to fill the vacancy alone. Whenever or however a vacancy may occur, there is power to fill it; no public exigency can therefore arise which can justify an illegal holding of an office in order that the duties of the office may be performed. If an administrative officer could hold his office until the appointment and qualification of his successor, notwithstanding the statutory limitation of his term of office, it would be within the power of the executive to continue such officers in office indefinitely. This would be abrogating an express provision of law. It would be also in effect, in certain cases, an appointment for the additional term by the President alone without the advice and consent of the Senate, which, no provision having been made therefor by Congress, is unauthorized by the Constitution. (Art. 2, sec. 2.)

The official bond of an officer holding over would not be liable for defaults which should occur after the expiration of his term of office. The obligation of an official bond is limited to the term of office fixed by law. (*United States vs. Eckford's Exec.*, 1 How., 259.)

The term of office of the justices of the supreme court, district attorneys, and marshals of the Territories is fixed at four years, *and until their successors are appointed and qualified*. (Secs. 1864, 1875, 1876.) Congress having thus made special provision in certain cases for officers holding over after the expiration of their term of office until the appointment and qualification of their successors, such right is not to be considered as existing independently of the statute, and it is to be presumed that in those cases in which provision has not been made Congress has deemed it wise to limit the term of office rigidly to a fixed period.

In the case of the *United States vs. Eckford's Executors* (1 How., 258) it is said:

"Under the act of [May 15], 1820, collectors [of the customs] can only be appointed for four years. At the end of this term the office becomes vacant, and must be filled by a new appointment."

It is also said by Attorney-General Speed, in the case of Tenure of Navy Agents (11 Op., 287):

"Every man holding office under the law holds it according to the law, and not otherwise. When the time limited by law as the official term of the appointee, whether he be an administrative or any other kind of an officer, expires, his official existence is determined, and unless a new appointment is made, either of the former incumbent or of another person, the office becomes vacant." (See also 12 Opin., 130; *Dorsey vs. Smith*, 28 Cal., 21; and *The People vs. Tieman*, 8 Abbott's Practice Reports, 359.)

In the case of John B. Burt (16 Op. Attys. Genl., 568), it was said:

"Major Burt's commission expired by operation of law, and of this he was as much bound to take notice as any other officer under the government. * * * It follows that Major Burt became a private citizen (so far as depended upon the appointment now under consideration) immediately after the 4th of July, 1864. Consequently, *the services afterwards rendered by him were merely voluntary, and did not create a legal right to pay.* The conclusion in law is that unless some subsequent legislation have recognized his right to pay, he is now a debtor to the United States for all money which he subsequently received."

The authority of adjudicated cases is in accordance with these views. In *People ex rel. Morton vs. Tieman*, 30 Barbour, 193, an officer holding over after his term expired by statutory limitation was denied the claim he made to the compensation prescribed by statute for the discharge of the duties of the office.

In the two following cases officers held over after the expiration of their respective terms of office. In the first of these, *Dorsey vs. Smyth*, 28 Cal., 25, it was said:

"Every man is presumed to know the law, and therefore Mr. Brown was bound to know under the circumstances who was his successor, and to yield the office upon his qualification and demand. He was bound to act at his peril, and if he held over, and thereafter it should appear that the party so qualifying and demanding the office had at the time a title thereto, he could claim nothing on the score of services rendered, for upon the determination of that question he became a usurper *ab initio*. The salary annexed to a public office is incident to the title to the office, and not to its occupation and exercise."

In *The People vs. Tieman*, 8 Abbott's Practice Reports, 361, there was an application by the relator, who was acting as city inspector of the city of New York, for a writ of mandamus to compel the mayor to countersign a warrant for the payment to the relator of the salary of city inspector *during the time he had been holding over after the expiration of his term of office.* The court said:

"The salary and fees are incident to the title, and not to the usurpation and colorable possession of an office. * * * But it does not follow [from the validity of certain acts of *de facto* officers] that a right can be asserted and enforced on behalf of one who acts merely under color of office, without legal authority, as if he were an officer *de jure*.

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When an individual claims by action the office or the incidents to the office, he can only recover upon proof of title. Possession under color of right may well serve as a shield for defense, but cannot as against the public be converted into a weapon of attack to secure the fruits of the usurpation and the incidents of the office." *Neale vs. Overseers*, 5 Watts, 538; *Patterson vs. Miller*, 2 Met. (Ky.), 496; *The People vs. Nosstrand*, 46 N. Y., 382; *Keyser vs. McKisson*, 2 Rawle, 139; *Fowler vs. Beebe*, 9 Mass., 231; *Pearce vs. Hawkins*, 2 Swan (Tenn.), 87; *Rhodes vs. McDonald*, 24 Miss., 418; and numerous other cases.

In *Matthews vs. The Board of Supervisors of Copiah County*, 53 Miss., 715, a party who was ineligible to hold office was elected sheriff, and having served as such brought assumpsit against the county to recover the amounts allowed him by the circuit court for employing baliffs and victualing prisoners. It was urged that an officer *de facto* who performs the duties of an office is entitled to the compensation prescribed by law, and authorities were cited: *Turner vs. Melony*, 13 Cal., 621; *Satterly vs. San Francisco*, 23 Cal., 314; *People vs. Collins*, 7 Johns., 649; *Leach vs. Casserly*, 23 Ind., 419; *Queen vs. Green*, 12 Ad. & Ell., 702; *Queen vs. Cambridge*, 12 *Id.*, 166; 45 Missouri, 542; *Pearce vs. Hawkins*, 2 Swan, 87; *Wayne County vs. Benoit*, 20 Mich., 181; *Swan vs. Buck*, 40 Miss., 268; see *Bowerbank vs. Morris*, Wallace, C. C. R., 129, 133.

This was controverted: *Neale vs. Overseers*, 5 Watts, 538; *Patterson vs. Miller*, 2 Met. (Ky.), 492; *People vs. Tieman*, 30 Barb., 193; *Kimball vs. Alcorn*, 45 Miss., 151; 28 Cal., 21; *Riddle vs. Bedford*, 7 Serg. & R., 386; *People vs. Hopson*, 1 Den., 574; *Lightly vs. Clouston*, 1 Taunt., 112.

The court denied the right to recover and said :

"Whenever a public officer propounds against the State, county, or city a claim for compensation for official services, he puts his title to the office in issue."

There are other cases as to *de facto* officers which tend to support the same view. In *Kimball vs. Alcorn*, 45 Miss., 157, it was said :

"It is a settled and salutary principle in English and American law that the acts of a *de facto* officer are valid, in so far as they affect the public or third persons who have an interest in them. But the principle is otherwise when the act is for the benefit of the officer; he shall not take advantage of his want of title, of which he must be cognizant. The sufferance of the state and silence of the government is construed to be a ratification of his acts, but not of his title."

In *The People vs. Hopson*, 1 Denio, 579, it was said :

"Clearly he cannot recover fees, or set up any right of property on the ground that he is an officer *de facto*, unless he be also an officer *de jure*."

In *Riddle vs. The County of Bedford*, 7 Serg. & Rawle, 392, it was said :

"Wherever the act done by an officer *de facto* has been declared to be valid, it is where some third person claims an interest or title in the

act done; and I have not been able after much research to find any decision where such act has been considered valid in an action by the *de facto* officer claiming for an act done for himself." *People vs. Weber*, 86 Ills., 285; *Wortham vs. Grayson Co.*, 13 Bush (Ky.), 57; *State vs. Brewer*, 59 Alab., 130; *People vs. Miller*, 24 Mich., 464; *Comstock vs. Grand Rapids*, 40 Mich., 399; *Dolan vs. Mayor of New York*, 68 N. Y., 274; *Glascok vs. Lyons*, 20 Ind., 4.

An intruder into an office will not be permitted to take advantage of his own wrong. *Venable vs. Curd*, 2 Head, 582; *Patterson vs. Miller*, 2 Metc. (Ky.), 493; *Gourley vs. Hankins*, 2 Iowa, 75; see *Dolan v. Mayor*, 68 N. Y., 274.

There are cases, and especially when *de facto* officers were *serving in a legal term*, which tend to support a different view. (*Connor vs. Mayor N. Y.*, 1 Selden, 296; *Smith vs. Mayor N. Y.*, 37 N. Y., 518; *Merriam vs. Clinch*, 6 Blatchford, 13; *Auditors of Wayne County vs. Beloit*, 20 Mich., 176.) But the law is settled.

In the case of *Embry vs. United States* (100 U. S., 680) a similar, yet clearly different, question to that presented in this case was decided. Embry had been suspended from office by the President during a recess of the Senate. The appointment of his successor was not confirmed during the next session of the Senate, and the legal term of Embry's suspension expired with that session. He did not, however, resume the duties of the office until ten days thereafter. The court decided that the actual incumbent of the office who performed the duties during the interval was entitled to the compensation for that period. The court said (p. 685):

"Although he [Embry] was lawfully in office, he was not entitled to pay or emolument while not performing its duties because of his suspension. It is true his lawful suspension ended on the 15th of July, but he did not resume possession until ten days afterwards. In the mean time, the person designated for that purpose performed his duties. Under these circumstances, the law [statute] gave the salary to the actual incumbent and not to him. The delay was an incident to the suspension, and does not seem to have been unreasonable. No more time elapsed than was necessary to give the proper notices and transfer the possession."

The court, in this case, simply followed the direction of the statute. The statute directs that the person designated to perform the duties of a suspended officer "shall, during the time he performs the duties of such officer, be entitled to the salary and emoluments of the office, no part of which shall belong to the officer suspended." (Sec. 1768.) And the court so distinctly stated:

"The law also provided that, if suspended, he should draw no salary so long as another person was performing his duties. * * * His present claim rests not on any contract, either express or implied, but upon the acts of Congress which provide for his salary."

There is nothing in Hunter's Case (1 Lawrence, Comptroller's Decisions, 151) inconsistent with the decision now made. In that case the law authorized the appointment of the officer. He was appointed; there was no adversary claimant to the office. He had, as said in *Dolan vs. The Mayor* (68 N. Y., 274), "a *prima facie* title," which he could not and did not "know to be invalid," and, in fact, his appointment *invested him with the legal title to the office*, so that he was not a mere volunteer, nor did he act in violation of the law. At most his appointment was "irregular." His claim to the fees of the office fell within the well-settled principle that "the right follows the true title" to the office.

An office does not create a *contract* so as to take from the legislative power its authority to change duties or compensation. The Constitution protects the salary of the President and judges of courts from change. (*Embry vs. United States*, 100 U. S., 685; *United States vs. McLean*, 95 U. S., 750; *Conner vs. Mayor N. Y.*, 1 Selden, 296; see Patton's Case, 7 Court Cls., 363; Twenty per cent. Cases, 9 *Id.*, 302.)

The marshal acted without authority of law after his term of office expired. (Rev. Stat., 788, 789, 790, 793; see Revised Statutes of Tennessee, 370, 371, 380, 381, 382, 383.) The provisions of the Revised Statutes taken from the "tenure of office act" (14 Stat., 430) do not affect this case. (Rev. Stat., 1769, 1770; 12 Op., 449, 457, 469; 15 Op., 62.)

No question is presented as to the right of a *de facto* officer to recover from *private parties* the fees prescribed for services rendered *at their instance and request*.

The claimant is not entitled to the compensation demanded.

TREASURY DEPARTMENT,

First Comptroller's Office, February 28, 1882.

IN THE MATTER OF MAXIMUM OF ANNUAL EMOLUMENTS OF DISTRICT ATTORNEY OF UTAH TERRITORY.—UTAH DISTRICT ATTORNEY'S CASE.

1. Construction given to the act of June 23, 1874 (18 Stat., 252), and to the act of June 27, 1864 (13 Stat., 196; Rev. Stat., 835), as affected by the act of 1874.
2. Application of the rule of construing statutes, that repeals by implication are not favored.
3. The effect of the statutes regulating the emoluments of the district attorney of Utah Territory is as follows: (1) He is not entitled to an annual salary of \$250; (2) he is entitled to retain annually out of the fees for services in cases under Territorial laws \$3,250, and the excess is to be paid into the Treasury of the United States; (3) his total annual compensation from all sources cannot exceed \$6,000.

The act of March 3, 1841 (5 Stat., 427; Rev. Stat., 770), gives to district attorneys of the United States, including those in Territories, an annual salary of \$200 (in the Territories, \$250; act February 27, 1813, 2 Stat, 806; Rev. Stat., 1880). The act of February 26, 1853 (10 Stat.,

161; Rev. Stat., 824), gives them prescribed fees for designated services. This act and that of June 27, 1864 (13 Stat., 196; Rev. Stat., 835), declares that no district attorney "shall, by reason of the discharge of the duties of his office now or hereafter required of him by law, * * * be allowed to retain out of the fees, charges, and emoluments therefor, whether prescribed by statute or allowed by a court or any judge thereof, a greater maximum [annual] compensation than \$6,000." The salary and fees under these acts are payable out of the Treasury of the United States.

By the second section of the "act in relation to courts and judicial officers in the Territory of Utah," approved June 23, 1874, it is made—

"The duty of the United States attorney * * * to attend all the courts of record having jurisdiction of offenses, as well under the laws of said Territory as of the United States, and perform the duties of prosecuting officer in all criminal cases arising in said courts." (18 Stats., 253.)

The seventh section provides that—

"The act of Congress of the United States, entitled 'An Act to regulate the fees and costs to be allowed clerks, marshals, and attorneys of the circuit and district courts of the United States, and for other purposes,' approved February 26, 1853, [10 Stat., 161, 169; Rev. Stat., 824, 827, 833, 835,] is extended over and shall apply to the fees of like officers in said Territory of Utah.

"But the district attorney shall not by fees [in cases under Territorial laws] and salary [of \$250 under act of 1813] together receive more than thirty-five hundred dollars per year; and all fees or moneys received by him above said amount shall be paid into the Treasury of the United States."

This act does not relate to cases arising under the laws of Congress in the supreme and district courts of Utah. Its purpose is to enforce the laws of the Territorial legislature, and it relates to cases arising under such laws. The same courts established by Congress have jurisdiction in cases arising under the laws of the United States and those arising under the Territorial laws. In practice, these courts hold sessions as courts of the United States and other sessions as Territorial courts.

The act of 1874 did not contemplate that the fees of the district attorney should be paid by the United States, but gave a right to payment "out of the treasury of the Territory." (Sec. 2, act June 23, 1874, 18 Stat., 253.) By subsequent legislation, expenses of the Territorial courts have been paid by the United States from annual appropriations. The first of these was made with a view to reimbursement by the Territory. Act March 3, 1875 (18 Stat., 358).

The First Comptroller is required to decide whether the district attorney for Utah is limited to \$3,500 per year for all services, or whether he may receive a maximum of \$6,000, or whether, if the fees and salary for services in the courts of the United States should reach \$6,000, he may in addition receive not more than the maximum of \$3,500 for services in the Territorial cases.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The act of 1874, by its title and its object, was designed to impose a duty on the district attorney of the United States in the Territory of Utah not imposed on the district attorney in any other Territory. For services it gave a right to the payment out of the treasury of the Territory of prescribed fees. This was exclusively for services as prosecuting officer in the courts in cases arising under the Territorial laws. If the fees earned for such services, including the salary of \$250 to be paid for services to the United States, reached \$3,500, the district attorney was entitled to that sum; if more, the excess was to be paid into the Treasury of the United States. This act did not repeal those provisions of prior statutes which fixed the maximum annual compensation of the district attorney at \$6,000, as the act of 1864 says, "by reason of the discharge of the duties of his office now or hereafter required of him by law."

The new duties imposed on the district attorney by the act of 1874 were and are "duties of his office." If this act had made no provision for additional fees, the district attorney could have received no fees for services under this act. Its purpose was to insure fees for the new service required and to limit the amount for such new service, but not to change the maximum otherwise prescribed by law. By the very terms of the act of 1864, the annual compensation for all services was permitted to reach, but was also limited to \$6,000. There is no express repeal, either of the right to reach and receive the maximum sum or of the effect of its limitation; and there can be no implied repeal, because a construction which would make such repeal is not favored, and there is no such repugnance or conflict of provisions between the two statutes as to render the operation of both impracticable, and hence it is proper to give each a clear purpose by holding that the limitation of the act of 1864 remains intact. There is nothing in the form which this act has taken, by its translation in other words into section 835 of the Revised Statutes, to change its effect. It is true the act of 1874 says, "The district attorney shall not by fees and salary together receive more than \$3,500 per year." But this refers to the fees for services in prosecutions under Territorial laws then payable "out of the treasury of the Territory." The salary of \$250 per year is for services in cases under acts of Congress in addition to fees in such cases, and this salary is to be computed as a part of the \$3,500 mentioned.

The act of 1874 imposes a duty not required of any other district attorney in a Territory, but it does not follow that he may receive a maximum compensation of \$9,500—\$6,000 for services in cases under the acts of Congress, and \$3,500 under the Territorial statutes. His compensation is not determined by the anomaly as to his duties, but by the statutes, and these are sufficiently plain. It is true where great duties are imposed this may be an element in construing the statutes giving compensation. But neither the extent of services required, nor the

sums of money affected thereby, nor the magnitude of the legal questions requiring attention, nor the population interested, nor the revenues brought to the national and Territorial treasuries, nor all combined, are greater or even equal to those in other districts; and in no district can the annual compensation exceed \$6,000. Hence, it cannot with any reasonable propriety be urged that a maximum compensation should be allowed the district attorney in Utah greater than any other; and as the language of the statute does not so require it cannot be so construed. It would seem unreasonable to suppose that Congress, in imposing new and additional duties by the act of 1874, intended at the same time to reduce the maximum of emoluments below the amount previously allowed without the increased labors. The statute is capable fairly by its language and purpose of a construction which avoids such injustice, and it will be so construed. For this purpose it is scarcely necessary to invoke the rule of construction as to statutes fixing the compensation of public officers, that when they fairly admit of two meanings that most favorable to the officer is to be adopted. (*United States vs. Morse*, 3 Story R., 87; *Moore's Case*, 4 Court Cls., 139.)

The result is :

1. The district attorney is entitled to an annual salary of \$250.
2. He is entitled to retain out of the fees prescribed for services in cases under the Territorial laws, \$3,250, which, with the salary of \$250, makes the sum of \$3,500 mentioned in the act of 1874.
3. If such fees (originally payable out of the Territorial treasury), together with said salary of \$250 (payable from the national Treasury) exceed \$3,500, the excess is to be paid into the Treasury of the United States.
4. The total annual compensation from all sources cannot exceed \$6,000.

TREASURY DEPARTMENT,

First Comptroller's Office, March 6, 1882.

IN THE MATTER OF THE ASSIGNMENT OF COMPENSATION TO BECOME DUE A CONTRACTOR FOR CARRYING THE MAILS.—WALSH'S CASE.

1. An affidavit to be used as evidence before accounting officers should generally state facts, and not mere opinions or legal conclusions unless made by experts as to questions of skill or science.
2. A contractor for carrying mails cannot assign his compensation to become due for services not yet performed so as to authorize payment to the assignee against the protest of the contractor.
3. Long-continued usage cannot change a clear and plain statute.
4. Payment of compensation for carrying the mails to an assignee of the contractor may estop the assignor from asserting a claim, but such estoppel cannot justify officers of the government in disregarding the statute prohibiting assignments.

5. On an appeal from the Auditor of the Treasury for the Post-Office Department to the First Comptroller, this officer will not, as a general rule, reverse the action of the Auditor for errors in law when not asked to do so and when no loss can result to any party.

A practice has prevailed in the Post-Office Department by which contractors for carrying the mails have been permitted to draw on the [Sixth] Auditor of the Treasury for the Post-Office Department "pay drafts" in favor of any purchaser thereof, "or order", for compensation to become due for services.*

The Auditor says, in a letter of January 19, 1882, "These pay drafts are not provided for by [statute or] the 'Postal Regulations,' but have been long in use, and this office has heretofore consented to receive such drafts as a matter of accommodation to contractors and other creditors of the government. To secure uniformity a certain printed form was prescribed and a circular form of receipt with conditions prepared."†

* The following is a copy of one of the drafts in the usual forms now to be considered :

Office of the Sixth Auditor of the Treasury, }
PAY DIVISION. } *Contractor's draft.*
Form 605.

\$443.]

WASHINGTON, D. C., July 1, 1880.

The Auditor of the Treasury for the Post-Office Department will please pay to John A. Walsh, or order, the sum of four hundred & forty-three dollars and — cents, out of any moneys due me on route No. 30162 in the State of Louisiana, for the quarter ending Sept. 30th, 1881.

I certify that this is the only draft drawn on said route for said quarter.

B. H. PETERSON,
Contractor.

Witness:

EDWARD DAY.

D. B. AINGER,

Postmaster at Washington, D. C.

By JAS. E. BELL,

Act'g Ass't P. M.

Drafts must be witnessed by a postmaster and one other responsible party.

Drafts must be properly indorsed by the payee, and all subsequent holders, with their post-office addresses, before they will be placed on file.

Drafts will be filed subject to fines, deductions, collections, the amount due the subcontractor, in accordance with the act of Congress approved May 17, 1878, and any claim or demand the Post-Office Department may have against the contractor.

Drafts of contractors are not "accepted;" they are received and placed on file.

Drafts of attorneys and subcontractors are not received.

† The following is the notice in this case, being in the usual form :

(PAY DIVISION, No. 6.)

OFFICE OF THE AUDITOR OF THE TREASURY
FOR THE POST-OFFICE DEPARTMENT,
Washington, D. C., July 1, 1881.

SIR: Your favor of the 1st July, 1881, inclosing drafts of B. H. Peterson, contractor on route No. 30162, La., for \$443 each, in favor of yourself, for the quarters ending Sep. 30 & Dec. 31, '81, & M'ch 31 & June 30, '82, is received, and will be filed subject

On the 1st day of July, 1881, John A. Walsh filed in the office of the Auditor of the Treasury for the Post-Office Department four pay drafts dated July 1, 1880, given by B. H. Peterson, contractor on route No. 30162, one for each of the four quarters of the fiscal year ending June 30, 1882, for which a receipt was given by the Auditor.

On the 11th day of October, 1881, before the settlement of Mr. Peterson's account had been reached, he filed a protest with the Auditor against paying any one of the drafts in favor of Walsh, giving as a reason that the consideration had wholly ceased and failed.

Mr. Walsh was notified by the Auditor of the filing of the protest, and replied by letter of October 21, 1881, declaring the drafts genuine and stating the manner in which they were filed ["in accordance with the regulations"].

One of the drafts on the Auditor to John Walsh, or order, for \$443, is dated July 1, 1880, payable out of any moneys due the contractor for the quarter ending September 30, 1881.

An affidavit filed with the Auditor by Peterson, November 14, 1881, says:

"He is entitled to receive the mail pay due on route No. 30162, La., for the quarter ending September 30, 1881; that John A. Walsh is not entitled to the draft * * * or the proceeds thereof; affiant is not indebted to the said Walsh in said sum of \$443, or any other sum."

June 30, 1881, the day prior to the date of the drafts to Walsh, Peterson gave a similar pay draft on the Auditor to George H. B. White, cashier, for \$3,000, payable, as it states, "out of any moneys due me on route No. 30162 * * * for the quarter ending September 30, 1881." This was filed with the Auditor in July, 1881, but the precise day does not appear. The compensation for service performed in compliance with the contract was sufficient to pay all the drafts. The pay clerk in

to fines, deductions, collections, and all liabilities of the contractor to the Post-Office Department.

The act of Congress approved May 17, 1878, requires the Auditor of the Treasury for the Post-Office Department, on receipt of notice of the lawful sub-letting of a contract, to retain, out of the amount due the original contractor or contractors, the amount stated in said notice as agreed to be paid to the subcontractor or subcontractors, and to pay said amount to the subcontractor or subcontractors upon certificate of the Second Assistant Postmaster-General.

Respectfully,

J. H. ELA,
Auditor.

JOHN A. WALSH, Esq.,
City.

Your attention is called to the following extract from the contract on file in this office:

"For which service when performed the said ————, contractor, is to be paid by the United States the sum of ———— dollars a year, quarterly, in the months of November, February, May, and August, through the postmasters on the route or otherwise, at the option of the Postmaster-General."

the Auditor's Office adjusted and stated an account against the United States in favor of Peterson for a balance of \$886 reserved in settlements of two quarters, including services for quarter ending September 30, 1881, and on February 23, 1882, the Auditor certified "that there is payable to G. H. B. White, cashier, assignee, the amount due on the above account." This rejected the claim of Walsh, and exhausted the fund out of which his draft could be paid. Before a warrant issued in favor of White for payment of this certified balance, Walsh appealed to the First Comptroller. Peterson, by his attorney, assented to this certification of balance, and assents to payment to White.

The Revised Statutes provide:

"SEC. 3963. No contractor for transporting the mail within or between the United States and any foreign country shall assign or transfer his contract, and all such assignments or transfers shall be null and void."

The act of May 17, 1878 (20 Stat., 61, sec. 3), provides that—

"When any person or persons being under contract with the Government of the United States for carrying the mails, shall lawfully sublet any such contract, or lawfully employ any other person or persons to perform the service by such contractor agreed to be performed, or any part thereof, he or they shall file in the office of the Second Assistant Postmaster-General a copy of his or their contract; and thereupon it shall be the duty of the Second Assistant Postmaster-General to notify the Auditor of the Treasury for the Post-Office Department of the fact of the filing in his office of such contract. Said notice shall embrace the name or names of the original contractor or contractors, the number of the route or routes, the name or names of the subcontractor or subcontractors, and the *amount agreed to be paid to the subcontractor or subcontractors*. And upon the receipt of said notice by the Auditor of the Treasury for the Post-Office Department, it shall be his duty to *retain, out of the amount due the original contractor or contractors, the amount stated in said notice* as agreed to be paid to the subcontractor or subcontractors, and shall pay said amount, upon the certificate of the Second Assistant Postmaster-General, to the subcontractor or subcontractors, under the same rules and regulations now governing the payments made to original contractors: *Provided*, That upon satisfactory evidence that the original contractor or contractors have paid off and discharged the amount due under his or their contract to the subcontractor or subcontractors, it shall be the duty of the Second Assistant Postmaster-General to certify such fact to the Auditor of the Treasury for the Post-Office Department; and thereupon said Auditor shall settle with the original contractor or contractors, under the same rules as are now provided by law for such settlements."

The Revised Statutes provide:

"SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the

issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same."

J. A. Walsh, in his letter to the Auditor, of December 7, 1881, makes points:

I. The Auditor having filed and acknowledged receipt of the draft is estopped from setting up the statute against assignments.

II. The custom of paying postal contractors' drafts is as old as the department, and is the unwritten law of the department valid by usage.

III. Peterson is estopped from denying the validity of the draft by giving it, by his knowledge of its filing with the Auditor, and his long acquiescence.

Charles E. Hovey for Peterson:

Custom cannot modify a statute. (The Forrester, Newberry, 81.)

Custom is only obligatory on parties when the law does not provide for the case. (The Lucy Ann, 23.Law Rep., 545.)

The long-continued usage of an illegal practice cannot ripen into binding law. (Floyd Acceptances, 7 Wall., 666; s. c., 1 Court Cl., 270.)

DECISION BY WILLIAM LAWRENCE, *First Comptroller*.

The affidavit of Peterson is wholly insufficient to invalidate the pay draft he gave to Walsh. It states opinions or legal conclusions, but not the facts on which they are based, and this is no more admissible in an affidavit than in a deposition.

This case involves the question whether a contractor for carrying mails can assign his compensation to become due for services not yet performed, so that payment may be made to the assignee against the protest of the assignor. The question has been decided in principle, and it is again affirmed, that such payment cannot be made. (See Contract-Assignment Case, 2 Lawrence, Comptroller's Decisions, p. 472; 16 Opinions Attys. Genl., 261.)

It is prohibited by the statute. (Rev. Stat., 3477.)

It is frequently difficult to determine whether a statute is directory or mandatory. (Sedgwick, Stat. and Const. L., 316, n.; McKune *vs.* Weller, 11 Cal., 49; Stayton *vs.* Huling, 7 Ind., 144; Koch *vs.* Bridges, 45 Miss., 247; Blake *vs.* Sherman, 12 Minn., 420; Frank *vs.* San Francisco, 21 Cal., 668; Veazie *vs.* China, 50 Me., 518; Milford *vs.* Orono, *Id.*, 529.)

But the authorities clearly show the statute now in question is on principle to be regarded as mandatory. (Sedgwick, 316; Hogan *vs.*

Devlin, 2 Daly, 184; Hines *vs.* Lockport, 5 Lansing, 21; People *vs.* San Francisco, 36 Cal., 595; Henderson's Case, 4 Court Cl., 75; Emery & Blake's Case, 4 *Id.*, 401; Supervisors *vs.* United States, 4 Wall., 435; City of Galena *vs.* Amy, 5 Wall., 705; Malcomb *vs.* Rogers, 5 Cow., 188; Mayor *vs.* Furze, 3 Hill, 612; Rex *vs.* Blackwold, 2 Chit., 251; Rex *vs.* Barlow, Salk., 609, Vern., 154; Davidson *vs.* Gill, 1 East, 64.)

The assignment is equally prohibited on common-law principles without the aid of the statute. (Bliss *vs.* Lawrence, 58 New York, 442; Billings *vs.* O'Brien, 45 Howard, New York Practice, 400.)

The common-law principle against the validity of such assignment would yield to a usage certain, reasonable, long continued without interruption, acquiesced in and enforced as obligatory. (Broom's Legal Maxims, 917.) But it is equally well settled that "as against a plain statutory law no usage is of any avail." Broom, Leg. Max., 684; Pochin *vs.* Duncombe, 1 H. & N., 857; Fermoy Peerage Case, 5 H. Lords Cas., 716; Gwyn *vs.* Hardwicke, 1 H. & N., 53; Gorham *vs.* Bishop of Exeter, 15 Q. B., 74 (69 E. C. L. R.); Pierce's Case, 7 Court Cl., 70. If the statute is susceptible of a construction in accordance with the usage, the usage is evidence of the law. But in this case it is not possible to construe the statute as giving sanction to assignments of this character without direct conflict with its plain language and manifest purpose. In *The Floyd Acceptances*, 7 Wall., 666, drafts were drawn on the Secretary of War "by army contractors before the services contracted for were received, or the supplies to be furnished were delivered." These were accepted by the Secretary of War, and the Supreme Court held that they "were mere accommodation loans of the credit of the United States, without authority, and therefore void." The usage as to such assignments doubtless grew up before the statute against assignments was enacted, and has been continued by sufferance. Such assignments are void upon principles settled by the Supreme Court. *The Floyd Acceptances*, 7 Wall., 666. See *Pierce vs. United States*, 1 Court Cl., 270; *Pierce's Case*, 7 Court Cl., 65; *United States vs. Gillis*, 95 U. S., 407; *Erwin vs. The United States*, 97 U. S., 392; *Spofford vs. Kirk*, *Id.*, 484; *McKnight vs. United States*, 98 U. S., 179; *Goodman vs. Niblack*, 102 U. S., 559; *Trist vs. Child*, 21 Wall., 441; *Safford's Case*, 1 Lawrence, Comptroller's Decisions, 285; *Neuchatel Co. Case*, 16 Court Cl., 593; *Buffalo B. R. R. Case*, 16 Court Cl., 238.

If payment should be made to the assignee, it would estop the assignor from making a claim against the United States. (*Cowdrey vs. Vandenburg*, 101 U. S., 575; *Buffalo Bayou R. R. Case*, 16 Court Cl., 238; *McKnight vs. United States*, 98 U. S., 186.) *Volenti non fit injuria. Consensus tollit errorem.* But this does not justify officers of the government in doing that which the law prohibits, at least in a case like this in which the contractor protests against payment to an assignee. The acceptance of the assignment by the Sixth Auditor does not estop

or bind the government, because he had no authority to do that which the law prohibits. (The Floyd Acceptances, 7 Wall., 667; *Filor vs. United States*, 9 Wall., 45.)

The Supreme Court held in 1841 that the Postmaster-General had authority to accept drafts of mail contractors in advance of service, and that they were negotiable. (*United States vs. Bank of Metropolis*, 15 Pet., 377, 392; see Rev. Stat., 396, 3641, 3644; Burroughs on Public Securities, 13; Elmes' Executive Departments, 345, sec. 942.) No notice was taken of the act of January 31, 1823 (Rev. Stat., 3648). The acts of July 29, 1846 (9 Stat., 41), and of February 26, 1853 (10 Stat., 170, now Rev. Stat., 3477), prohibiting the assignment of claims, were not then in force. But in the Floyd Acceptances the former decision was in effect and in principle overruled, and the decision in part placed on the act of 1823, prohibiting payments in advance of services rendered. (Burroughs, Public Securities, 13; Jackson's Case, 1 Court Cl., 260.)

As between White and Walsh, the latter is prior in time. And there is a maxim, *Qui prior est tempore, potior est jure*. But in this case Walsh has no right which can be protected.

The only point of difficulty is whether the action of the Auditor in certifying a balance in favor of White, who is also an assignee, can also be affirmed. If the affirmance could be construed to assert the validity of the assignment, it would not be made. But as Peterson assents to the certification in favor of, and payment to, White, and as this protects the government, it is deemed proper in view of all this, and of the usage which has so long prevailed, to affirm the action of the Auditor. If any party in interest made any objection, it would not be affirmed. The question does not arise as it would if the First Comptroller were asked to certify a balance. No party is here objecting to a certification in favor of White, except Walsh, who has no right to object. The First Comptroller, as in cases before judicial courts of error, will not, *sua sponte*, and as a general rule, reverse the action of the tribunal to be reviewed when not asked to do so, and when no error is alleged by any party having a legal right to object, and when no loss or prejudice can result to any such party.

This case affords an illustration of the wisdom of the statute against assignments.

The action of the Auditor is affirmed.

TREASURY DEPARTMENT,

First Comptroller's Office, March 11, 1882.

IN THE MATTER OF REFUNDING STAMP TAX ON MALAKOF BITTERS.—
MALAKOF BITTERS CASE.

1. A compound liquor put up in bottles and "held out" and "recommended to the public" by the maker as a "remedy" for diseases "affecting the human body" is subject to the stamp tax required in Schedule A to section 3437 of the Revised Statutes.
2. When a claim for refunding tax is made under section 3426 of the Revised Statutes (act March 1, 1879, sec. 17, 20 Stat., 349), as for stamps "*unnecessarily used*," the proper accounting officers are required to decide whether the stamps *were* "*unnecessarily used*."
3. The right to a refund considered in case a claimant should make an article to be sold in a mode to evade the revenue law.
4. A claimant for a refund of stamp tax unnecessarily used on Malakof bitters is estopped from denying that such bitters were of the character in which they were by him held out and recommended to the public.
5. The First Comptroller is not concluded by the action of the Commissioner of Internal Revenue on refunding claims.
6. A *prima facie* case explained.
7. The effect stated of an allowance by the Commissioner of Internal Revenue of a refunding claim.
8. What is evidence of a right of action?

From 1877 to 1881, both years inclusive, Alphonse Walz, of New Orleans, was, and paid taxes as, a rectifier, a wholesale dealer and a retail dealer in spirits. (Rev. Stat., 3244; act February 8, 1875, 18 Stat., 310; act March 1, 1879, sec. 4, 20 Stat., 333.) In November, 1877, he commenced the manufacture of "Malakof Bitters." He stamped (Rev. Stat., 3437, Schedule A), *advertised*, and sold the bitters as a *medicinal preparation* until September 8, 1881, without referring the question of liability to stamp tax to the revenue officers. The Commissioner of Internal Revenue decided (Rev. Stat., 321) September 5, 1881, that the "Malakof Bitters" was a "*compound liquor*," and was not liable to a stamp tax.*

* His hand-bill advertisement was as follows:

Prize medal awarded at the Paris Exposition, 1878.

MALAKOF BITTERS, PATENTE EN 1866.

Premières Primes remportées, aux Expositions de la Louisiane, en 1868, 1870, et 1871.

Ce cordial, agréable et très savoureux, est le stimulant le plus sain, que l'on ait encore produit jusqu'ici; il est composé d'ingrédients aromatiques et amers, qui, lorsqu'on en fait usage modérément, est un excitant aussi bien qu'un fortifiant pour le système digestif, c'est aussi un dépuratif excellent.

Il n'a pas de supérieur parmi toutes les préparations de notre époque. Le propriétaire possède à l'appui de son efficacité les certificats de la faculté médicale de la Louisiane. Il guérit ou prévient les fièvres en général, et autres désordres intérieurs; il combat aussi la dyspepsie, la névralgie, ainsi que la constipation occasionnée par l'abus des médicaments et les affections du cœur. Il est efficace dans les maladies de la

Mr. Walz claims, under section 3426 of the Revised Statutes (act March 1, 1879, sec. 17, 20 Stat., 349), the refund of \$799.40 for the stamps unnecessarily used on said bitters from March 1, 1879, to September 8, 1881. The Commissioner has allowed that sum less 5 per cent., viz, \$759.52.

The question is submitted to the First Comptroller to decide whether the claim shall be paid.

George L. Douglass, for the claimant, submitted points orally.

1. The article "held out" as a remedy for diseases must be actually one of those mentioned in the first clause of Schedule A to section 3437, to wit, a bottle containing "bitters," "tonics," "spirits," &c. It is not enough that the article is called bitters or a tonic, if, in fact, it is only whisky. If the claimant had advertised and held out whisky in bottles as a remedy for diseases he would not have been required to stamp them.

2. The Commissioner of Internal Revenue has decided that the Malakof bitters is not one of the articles so enumerated, but only "a compound

vessie et les maux de reins. C'est un tonique très puissant dans le cas d'épuisement du système.

C'est un breuvage inoffensif pour les femmes et les enfants, et un excellent anti-billaire. Ce bitter est spécialement destiné à l'usage des familles.

MALAKOF BITTERS, PATENTED IN 1866.

[Trade-mark.]

First premium awarded in 1868, 1870, and 1871 by the Louisiana State Fairs.

This cordial, the most palatable, flavorful, and wholesome stimulant ever yet *prepared from aromatic and bitter ingredients*, when taken in a moderate quantity is an excellent appetizer as well as a strengthener of the digestive forces—a depurative of the blood, desirable alike as a corrective and mild cathartic. It has no superior among the standard preparations of the day, and is indorsed by the medical fraternity of Louisiana; it overcomes and prevents fever and ague and other malarial disorders with wondrous certainty, tones the system, banishes dyspepsia, remedies constipation and liver complaint, relieves affection of the bladder and kidneys; it is refreshing and a powerful recuperant after the frame has been reduced and attenuated by sickness; a mild and safe invigorant and corroborant for delicate females and children; a good anti-bilious, alterative, and tonic preparation for ordinary family purposes.

MALAKOF BITTERS. PATENTED IN 1866.

Die erste prämie zuerkannt in 1868, 1870, und 1871 auf der Louisiana Staats Ausstellung.

Das Malakof Bitters ist anerkannt als der schmackhafteste liqueur welcher bis jetzt von aromatischen Kräutern gemacht worden ist, und wenn in bescheidenem Maasse genossen, befördert er den Appetit und starkt die Verdauungsorgane, und wird besonders als Blut-Reiniger und Mittel gegen Fieber sowie alle Arten Krankheiten und malarische Anfälle von den medizinischen Autoritäten des Staates Louisiana empfohlen.

Mit Sicherheit auf Erfolg ist es gegen Dyspepsia, Verstopfung, Leber-und Nieren-leiden zu gebrauchen, erfrischt und Kräftigt in Wunderbarer Weise den Körper nach angreifender Krankheit und ist für den Hausgebrauch aufs angelegenlichste zu empfehlen.

ALPH. WALZ, 26 Conti Street, New Orleans, La.,

Sole Proprietor and Manufacturer.

liquor, and as such not liable to stamp tax." Whether a mixture is or is not bitters, or is or is not a compound liquor is a question of fact solely. All such questions arising under section 3426 are left expressly to the Commissioner of Internal Revenue to decide; and his judgment is conclusive. (Woolner's Case, 13 Court Claims, 366.) This does not present any question of "accounting," and hence is not within the jurisdiction of the Comptroller or other accounting officers.

3. The "compound liquor" has already paid (1) a tax as spirits, (2) the claimant paid tax as a rectifier, and (3) retailers vending it paid tax as such. The law does not authorize or contemplate another tax. The three taxes named are all the taxes required by law.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

This claim must be rejected because the claimant, as "maker" of the "Malakof Bitters," "held out" and "recommended to the public" his preparation as a *remedy for diseases* "affecting the human body."

By stamping the bitters, Walz was enabled (1) to sell as a *medical preparation* an article which was only a *compound liquor*, and (2) also possibly, if not probably, to work a loss to the revenue by enabling grocers, druggists, and other persons to make sales, who had not paid the government tax, so as to authorize them to sell spirits at retail. (Act February 8, 1875, sec. 16, 18 Stat., 310; act March 1, 1879, 20 Stat., 333, sec. 4, 18.) Having had the advantage which the stamps afforded him of distributing the bitters for sale among a class of dealers not required to pay a tax in order to authorize them to sell liquor, the claimant now asks the refund of the value of the stamps used.

A stamp tax is imposed on articles enumerated in Schedule A, following section 3437 of the Revised Statutes, as follows:

"For and upon every packet, box, bottle, * * * containing any pills, * * * syrups, cordials, bitters, tonics, * * * waters, essences, *spirits*, oils, or other medical preparations or compositions whatsoever (1) made and sold, or (2) removed for consumption and sale by any person or persons whatever, wherein the person making or preparing the same has or claims to have (a) any private formula or (b) occult secret or (c) art for the making or preparing the same, * * * or (d) *held out or recommended to the public by the makers*, vendors, or *proprietors thereof* as proprietary medicines or as *remedies or specifics for any disease, diseases, or affections whatever affecting the human or animal body.*"

According to the evidence in this case, as shown by the claim and by the foregoing publication, the claimant has, in the language of Schedule A, during the period covered by his claim "prepared, uttered, vended, * * * exposed for sale," and sold large quantities of a certain article put up in bottles, and called by him "Malakof Bitters," which article "he held out" and "recommended to the public" as a remedy or specific for "*certain diseases or affections*" affecting the human body enumerated in the said publication.

The liability to stamp tax under this schedule does not depend upon the quality or efficacy of the article made or sold, or whether the quantity recommended to be taken contains a dose of medicinal ingredients or contains any such ingredients or extracts at all. It is the *holding out and recommending to the public of the article*—"Malakof Bitters"—as a remedy or specific for the named diseases affecting the human body which constitutes the liability. (See section 3436.) So long as the claimant makes and so holds out and recommends the "Malakof Bitters," this article is clearly subject to the stamp tax. The manufacturer holds himself out to the public in the character of the compounder of an article having certain specific and remedial qualities.

Although the average intelligent citizen may have no confidence in the medicinal or remedial qualities of the so-called bitters so commonly in use, it is, nevertheless, true that, while probably the large majority of these compounds are consumed as beverages, many persons take them on the faith reposed in their advertised medicinal qualities. A druggist is bound to know the properties of the medicines he vends. The rule by which care and diligence exempts a party from liability does not apply where a person is injured by a prescription improperly prepared by a druggist. The latter cannot shield himself from damages in such case, even by showing that he has used extraordinary care in compounding the medicine. (*Fleet vs. Hollenkemp*, 13 B. Monroe, 219.) A druggist who makes fraudulent representations as to the character of a medicinal article sold cannot, in action against him to recover back the purchase price or for loss arising from such representations, be allowed to make that fraud a defense, even when the article itself was harmless. A druggist who by mistake, and without any false or fraudulent representations, sells a wrong article, one which is in itself harmless, is liable in tort for loss or injury to the purchaser (*Davidson vs. Nichols*, 11 Allen, 514); much more is he liable when the article sold is a dangerous or poisonous preparation. (*Thomas vs. Winchester*, 2 Seld. (N. Y.), 397). If great care in the compounding of the article is no defense in such case, how much less would be deliberate deception?

If the "Malakof Bitters" is not in fact what the manufacturer publicly represents the article to be, he, more than all other persons, is estopped from showing that it is not the kind of article so represented. It is well-settled law that upon the sale of an article by the manufacturer, there is an implied warranty that it will answer the purpose for which it was made. (*Brown vs. Murphee*, 31 Miss., 91; *Cunningham vs. Hall*, 1 Sprague, 404; *Beers vs. Williams*, 16 Ill., 69; *Brenton vs. Davis*, 8 Blackf., 317; *Boyd vs. Crawford, Add.*, 150; *Overton, vs. Phelan*, 2 Head, 445; *Walton vs. Cody*, 1 Wisc., 420.) Under this rule, the manufacturer of the "Malakof Bitters" would be held as warranting the article to be medicinal. Even in the case of the sale of provisions for domestic use, the vendor at his peril is bound to know that they are sound and wholesome; and if they are not so, he is liable to an action on

the case, at the suit of the vendee. (*Van Bracklin vs. Fonda*, 12 Johns., 467; *Hoover vs. Peters*, 18 Mich., 51; *Divine vs. McCormick*, 50 Barb., 116; *Pease vs. Sabin*, 38 Vt., 432; *Fish vs. Roseberry*, 22 Ill., 288; *Babcock vs. Trice*, 18 Ill., 420; *Borrekins vs. Bevan*, 3 Rawle, 23; *Jennings vs. Gratz*, *Id.*, 168.) It is not intended to say that the Malakof Bitters were not all that they were represented. It may be presumed they were. The legal question now is not what they were, but what they were represented to be.

Applying these principles of law to the case under consideration, it must be held that the manufacturer of the article uttered and advertised to the public as a medicinal preparation or compound under the name of "Malakof Bitters" is estopped from defending himself from any legal liability which may result from the sale or consumption of the article. So far as the Government of the United States is concerned, the legal liability thereto is that laid down in Schedule A, namely, the payment of the stamp tax on each bottle offered for sale or sold. It is not to be presumed that Congress intended to impose on the internal-revenue officers the duty of making a chemical or medical examination of the articles enumerated in Schedule A, in order to determine whether they are actually such articles, or have such properties as the manufacturers represent them to be or to have. The manufacturer himself fixes their character to the extent that, if his published description of any of them falls within that of Schedule A, it is clearly liable to the stamp tax. If it turns out to be a totally different article, it is no less liable to that tax, so long as it is made and sold under such description. If it is a dangerous or worthless compound, his liability is to the purchaser. If it is an alcoholic beverage in disguise, he is not only liable to the stamp tax, but also to the special tax or taxes imposed by law on manufacturers, compounders, or dealers in distilled spirits. It is shown in this case by the manufacturer's admission, and by the decision of the Commissioner of Internal Revenue, that the article sold as "Malakof Bitters" is, in fact, merely an alcoholic beverage, or a "compound liquor", having no medicinal quality in the proper sense of the words. This, however, does not help the case. It has been urged that the affixing of the stamp enables the manufacturer to enlarge his field of sale, and that to reject the claim would be to secure him the right to dispose of the bitters to dealers who would sell it without payment of special tax as liquor dealers. There is no force in this argument. The United States Government does not guaranty the stamped article to be what it is represented, and the law nowhere exempts such article from any other taxation to which it may be liable.

This claim must be rejected for the reason stated. It would be rejected if sufficient evidence were furnished that sales were made of the Malakof Bitters with the assent of the manufacturer by retail dealers who had not paid the requisite tax to authorize them to make sales. (*Leggett's Case*, 2 Lawrence, Comptroller's Decision, p. 349.) But it is

not necessary to take evidence on this subject. New evidence is authorized if deemed necessary. (Rev. Stat., 184.)

It is urged in support of this claim that no article "held out or recommended" as a remedy for diseases is subject to stamp tax, except those *specifically enumerated* in the first paragraph of Schedule A.

Assuming this to be so, this paragraph enumerates "bitters" and "spirits" as articles subject to stamp tax if "held out" as so *prepared* or medicated as to be a *remedy for disease*. The *evidence shows* that the claimant called the article he made "bitters," and he represented it as "prepared from aromatic and bitter ingredients," and thus so medicated as that it "remedies constipation and liver complaint." When the claimant thus advertised his preparation as "bitters," this is sufficient evidence that it is one of the articles specifically enumerated in the first paragraph of Schedule A. And it has been shown that the claimant is estopped from controverting this admission after the revenue officers and the public so accepted the representation.

But if the claimant can controvert this, still the evidence shows, and the Commissioner of Internal Revenue has found, that his preparation is a "compound liquor," and this is "spirits"—one of the articles specifically enumerated in the schedule. Executive officers take official notice of the ordinary meaning of words, and hence know that compound liquors are *spirits*.

If the claimant had held out whisky as a remedy for disease, stamps would have been unnecessary, but if he should "*hold out*" whisky as being so medicated with "bitter ingredients" as to be a remedy for disease, stamps would be required.

It is urged that the Commissioner of Internal Revenue has decided that the Malakof Bitters are not subject to stamp tax; that he has allowed this claim, and that *both* the *finding* and the *allowance* are conclusive on the First Comptroller. The Supreme Court has never held that the allowance by the Commissioner is *conclusive* anywhere. The allowance is *prima facie* evidence of a right of action in the Court of Claims, but it may be *there* shown, as it is supposed, and certainly before the accounting officers, that the Commissioner was mistaken on any question of law or fact, or that the whole evidence does not support the claim. If this be not so, there is no mode of correcting any error of fact on which the Commissioner acted. On this assumption no new evidence could be received, and the provisions of law expressly authorizing new and additional evidence (Rev. Stat., 184) would be nullified. (United States *vs.* Kaufman, 96 U. S., 570; United States *vs.* The Real Estate Savings Bank of Pittsburgh, 104 U. S., 728.) In the latter case the attention of the court was called to the question whether the allowance of the Commissioner was conclusive on the accounting officers, and the court, referring to this and the Kaufman case, said, "We did not then, and need not now, decide" that question. That question cannot arise in an action in the Court of Claims to recover the amount al-

lowed by the Commissioner, and anything, therefore, said upon the subject would merely be an *obiter dictum*.

There can be no doubt of the authority of accounting officers to pass upon the question presented in the form in which it now is, whether the bitters were subject to a stamp tax. This subject has been elsewhere somewhat fully considered. (1 Lawrence, Comptroller's Decisions, Appendix, ch. xii; *United States vs. Kaufman*, 95 U. S., 571; *United States vs. Real Estate Savings Bank*, 104 U. S., 728.) The authority of accounting officers as stated results from the language of the statute under which the claim is made (Rev. Stat., 3426; act March 1, 1879, sec. 17, 20 Stats., 349). This authorizes a refund for stamps "unnecessarily used." When a refund is asked, the officers charged with the duty of authorizing it must necessarily inquire if the stamps were unnecessarily used. No law has substituted the judgment of any other officer for them, or made the judgment of any other officer conclusive on them.

The Attorney-General has held that "regulations" duly authorized do not, as a general rule, conclude accounting officers from exercising their powers. (16 Op., 494; see *United States vs. Smith*, 1 Bond, C. C. R., 68; *Converse vs. United States*, 21 How., 464; *Gordon vs. United States*, 7 Wall., 188.)

There are two classes of cases of rare occurrence, examples of which have been cited, in which the accounting officers are required to accept as valid claims allowed by other officers: *first*, when such allowance is made by virtue of a statute which, in express terms or unequivocally in effect, declares the allowance conclusive (1 Lawrence, Comptroller's Decisions, Appendix, ch. xii, p. 533, 542); and, *second*, when an officer is authorized to expend money under a statute clearly giving him discretionary authority as to the manner, amount, and purposes of the expenditure. (*Id.*, 542).

This case presents no question of the exercise by the Commissioner of discretionary power. Not a single authority can be produced to show any such position. Hence, unless some statute has expressly made his allowance conclusive on accounting officers, it is not so; and there is no such statute. His sole authority is to examine the evidence and make a decision thereon, which, for the purposes of an action in the Court of Claims, is *prima facie* evidence of a right of action. In *United States vs. Real Estate Savings Bank*, 104 U. S., 728, the court say "the allowance may be used as the basis of an action against the United States in the Court of Claims, where it will be *prima facie* evidence of the amount that is due, and put on the government the burden of showing fraud or *mistake*." It is open to show "mistake" in the judgment of the Commissioner on every question of law and fact. A *prima facie* case is that which appears on the first view and without examination back of this. The allowance is one thing, the evidence on which it is based is another and different thing. It has been held that the allowance is *per se* and

unaided *prima facie* evidence of a right.* If the whole evidence does not justify the allowance, then an *error* or "*mistake*" has been made to the prejudice of the United States. It is not to be presumed that the law has been so constructed as to afford no relief against such error; and it has not. If an allowance which is only *prima facie* evidence of a right, does not permit an inquiry upon the law and all the evidence whether the right legally exists, then it is practically conclusive and not *prima facie*. It is conceded that "*mistake*" may be shown in the allowance, and the Supreme Court has said, as to cases in court, the "*mistake* must be established by competent evidence." The evidence before the Commissioner is "*competent evidence*." When this is submitted to the revisory accounting officers, their judgment is by the law invoked on it. If, in their judgment, such evidence does not make a *prima facie* case, nor any case for payment, the *prima facie* case is gone. If the accounting officers cannot consider this evidence, for what purpose does the law require it to be submitted to them?

Bouvier defines *prima facie*, "at first view or appearance of the business: as the holder of a bill of exchange indorsed in blank is *prima facie* its owner. . *Prima facie* evidence of fact is in law sufficient to establish the fact unless rebutted." In *Kelly vs. Jackson*, 6 Peters, 622, it is decided that, "in a legal sense, then, such *prima facie* evidence, in the absence of all controlling evidence, or discrediting circumstances, becomes conclusive of the fact; that is, it should operate upon the minds of the jury as decisive to found their verdict as to the fact." And the court referring to an indenture offered in evidence say, "there was sufficient *prima facie* evidence of the due execution of the indenture * * * to justify the court in admitting it to be read to the jury, and that in the absence of all controlling evidence the jury would have been bound to find that it was duly executed." In *United States vs. Wiggins*, 14 Peters, 347, that case was cited with approval; and the court, holding that a certified copy of a decree was *prima facie* evidence, proceed to show that it may be "*rebutted*" by evidence, and if so, say "*it ought to be rejected*." And there are numerous cases to show that where an officer is charged with the duty, as accounting officers are, to "*consider the justice and validity of all claims*," and a *prima facie* case is made by the authentication or allowance of an officer, the whole evidence is to be examined to ascertain whether such *prima facie* case is rebutted, and thereby a "*mistake*" of fact or of law is shown in previously having regarded it as authentic or properly allowed. (French

* *Kaufman Case*, 96 U. S., 567; *Savings Bank Case*, 104 U. S., 728; see *Gordon vs. U. S.*, 7 Wall, 188; *Chorpenning vs. U. S.*, 94 U. S. 399. It seems that a power by an officer other than an accounting officer to *allow* gives a *prima facie* right of action in the court, but a power by accounting officers to decide on claims, and "*certify a balance*" due, gives no such right. *McKnight's Case*, 13 C. Cl., 309; *Clyde vs. U. S.*, 13 Wall., 35; *Gillis' Case*, 95 U. S., 407.

These two powers—to allow and to certify balances—it would seem, have different purposes, and hence the rules above stated.

vs. Frazier, 7 J. J. Marsh., Ky., 425, 432; *Pinkham vs. Gear*, 3 N. H., 484; *Finn vs. Commonwealth*, 5 Rand. Va., 701; *Phillips vs. Berick*, 16 Johns., 137; 1 South., N. J., 77; *Ducoign vs. Schreppel*, 1 Yeates, Pa., 347; 2 Nott & McCord, South Car., 320; 1 Missouri, 341; *Allen vs. Gray*, 11 Conn., 95; *Parker vs. Smedley*, 2 Root, Conn., 286; *Taylor vs. Pettibone*, 16 Johns., N. Y., 66; *Benjamin vs. Sinclair*, 1 Bailey, S. Car., 174; *Bodley vs. Hord*, 2 A. K. Marsh., 244; 3 C. B., 229; 2 Opin., 650.)

Accounting officers are compelled by express law to examine the evidence (Rev. Stat., 236, 277, 269, 191, 1841; act June 14, 1878; 20 Stat., 130, sec. 4), and "to consider the justice and validity of all claims"; and it is supposed courts may "impeach" an allowance of the Commissioner for any "mistake" of fact either in the evidence on which he acted or in his conclusions. The "mistake" is shown when, upon the whole evidence, the original *prima facie* is "rebutted." If the allowance of the Commissioner should now be accepted as *prima facie* evidence of a claim, the *prima facie* right disappears when all the evidence is examined.

But if the allowance of the Commissioner should now and here be regarded as *prima facie* evidence that the claimant is entitled to a refund for the stamps he used, it is shown by the evidence that the claimant prepared a "*mixed liquor*," medicated, or, as he represented, "prepared from aromatic and bitter ingredients," which he "held out" and "recommended to the public" as a "remedy for disease." And upon *these facts* the Malakof Bitters, put up and sold in "bottles," were, beyond all question, subject to stamp tax by the clear terms and manifest purpose of the statute. While a maker of mixed liquors having no medicinal quality other than such as pertain to such liquors renders them liable to stamp tax by holding them out to the public as a remedy for diseases, this fact does not authorize their sale by retail dealers without the payment of the tax required by law, or relieve the maker from liability to tax required by law as to spirits.*

The claim is rejected.

TREASURY DEPARTMENT,

First Comptroller's Office, March 15, 1882.

* The Schedule A above referred to is as follows:

SCHEDULE A.—*Medicines or preparations.*

For and upon every packet, box, bottle, pot, phial, or other inclosure containing any pills, powders, tinctures, troches, lozenges, sirups, cordials, bitters, anodynes, tonics, plasters, liniments, salves, ointments, pastes, drops, waters, essences, spirits, oils, or other medicinal preparations or compositions whatsoever, made and sold or removed for consumption and sale by any person or persons whatever, wherein the person making or preparing the same has or claims to have any private formula or occult secret or art for the making or preparing the same, or has or claims to have any exclusive right or title to the making or preparing the same, or which are prepared, uttered, vended, or exposed for sale under any letters patent, or held out or recommended to the public by the makers, venders, or proprietors thereof as proprie-

IN THE MATTER OF CONSULAR RELIEF FOR DESTITUTE AMERICAN SEAMEN.—SEAMAN-RELIEF CASE.

1. It is to be presumed that the act of an American consul at a foreign port in granting relief to a person claiming to be an American seamen is legal.
2. The consular regulation, section 260 (Regulations, 1881, p. 84), is authorized by statute and has the force of law.
3. This regulation constitutes a consul affording relief to a party, the judge to decide whether the applicant therefor is (1) an American seaman, and (2) entitled to relief.
4. He is not required to report the evidence on which he decides in such case.
5. When a consul decides that a party applying for relief is an American seaman entitled thereto, and has disbursed money for the relief of the seamen, his report of the facts is *prima facie* evidence of his right to have credit therefor in the settlements of his accounts, and if not impeached for fraud or gross neglect of duty is conclusive.

With the account of S. P. Bayley, United States consul at Palermo, Sicily, for relief of destitute American seamen for the quarter ending September 30, 1881, made out in the usual form prescribed by the Consular Regulations of 1881, are a "statement of cases of relief" (Form No. 94, p. 554, U. S. Consular Regulations of 1880), an "account current" (Form No. 100, *ib.* p. 558), a "return of seamen who have come upon the consulate otherwise than in the employment of vessels, or by regular discharge therefrom" (Form No. 126, p. 573), and one "voucher for boarding and lodging" (Form No. 95, p. 555). This voucher is for board and lodging \$29.50, and washing, \$3.50, for I. Hooker, who is reported in the returns above referred to as "a destitute American seaman" from the ship *Scotia*, of Bath, Me., Oliver, master. The papers set forth that the seaman came upon the consulate at Palermo February 2, 1881, and left on the 29th of August, 1881, having been sent to Naples for shipment to the United States. The consul notes on the statement that this seaman "came upon the consulate overland from Trapani," a seaport town of

tary medicines, or as remedies or specifics for any disease, diseases, or affections whatever affecting the human or animal body. * * * * *

Section 3426 of the Revised Statutes is as follows:

The Commissioner of Internal Revenue may, from time to time, make regulations, upon proper evidence of the facts, for the allowance of such of the stamps issued under the provisions of this chapter, or any internal revenue act, as may have been spoiled, destroyed, or rendered useless or unfit for the purpose intended, or for which the owner may have no use, or which through mistake may have been improperly or unnecessarily used, or where the rates or duties represented thereby have been paid in error or remitted, and such allowance shall be made either by giving other stamps in lieu of the stamps so allowed for, or by repaying the amount or value after deducting therefrom, in case of repayment, the sum of five per centum to the owner thereof; but no allowance shall be made in any case until the stamps so spoiled or rendered useless shall have been returned to the Commissioner of Internal Revenue, or until satisfactory proof has been made showing the reason why said stamps cannot be so returned.

Sicily, and that the date and cause of his leaving the vessel on which he was last employed was unknown.

The papers, with the account as adjusted by the Fifth Auditor, are submitted to the First Comptroller to decide whether the voucher referred to should be allowed, or rejected *for want of evidence that Hooker was an American seaman*, or because the reason for his leaving the vessel on which he was last employed is not known.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes provide that:

SEC. 4577. It shall be the duty of the consuls, vice-consuls, commercial agents, and vice-commercial agents, from time to time, to provide for the seamen of the United States who may be found destitute within their districts, respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, *subject to such instructions as the Secretary of State shall give*. The seamen shall, if able, be bound to do duty on board the vessels in which they may be transported, according to their several abilities.

The Consular Regulations (paragraph 260, p. 84), prepared under the direction and authority of the Secretary of State, and prescribed by the President, contain this provision:

Before granting relief, a consular officer should satisfy himself that the applicant is an American seaman, as already defined [in paragraphs 199, 200, 204–6; *Matthews vs. Offley*, 3 Sumner, 125], and that he is entitled to relief under the statutes, usages, and decisions hereinbefore referred to, and that he is destitute.

Many of the seamen relieved by consular officers are not discharged from American vessels at the consulate, but are such as come upon the consulate “casually” from other ports or places, having deserted from their vessels, or having been left behind, or been driven ashore by cruel treatment, or having been shipwrecked, and from other causes. (See Consular Regulations, paragraph 232.*)

It is to be presumed that the consul in relieving Mr. Hooker as an American seaman did so in good faith, believing him to be such, and entitled to relief, because of the maxim, *omnia præsumuntur ritè et solenniter esse acta donec probetur in contrarium*. There is nothing in the papers to rebut this presumption. The relief was, doubtless, entirely proper.

The consular “regulation” under which the consul acted is clearly authorized by the statute; it has, therefore, the force of law. It requires the consul “to satisfy himself” of two things, (1) “that the applicant [for relief] is an American seaman” as defined by the regulations, and (2) “that he is entitled to relief.” The regulation having thus

* This paragraph was taken from a circular prepared at the request made June 20, 1864, by Hon. R. W. Taylor, First Comptroller, and addressed to consuls.

constituted the consul the judge to decide the two matters stated, and having directed him to disburse money on his own decision of such matters, without any delay, without time or opportunity to submit the propriety of the disbursement to any accounting or other officer, it would operate as a great hardship if, after the consul had expended the money, he should be denied credit for it in his accounts, or be required to refund it, when he has acted in good faith, and, as must be presumed, with a reasonable exercise of good judgment. In cases of this character the consul is required to act promptly; and he is often without the means of obtaining the clearest or fullest evidence. He is not required by law or regulations to preserve or report the evidence on which he acts (*Matthews vs. Offley*, 3 Sumner, 123). By the language of the statute and the regulation, and the manifest purpose of Congress fairly deducible therefrom, it must be held that the consul is made the judge to decide the matters on which he is required to act, and when he does so in *good faith*, and disburses money thereon, he is entitled to credit in his accounts for the money so disbursed. His report is *prima facie* evidence of a right to credit. It is not necessarily conclusive. It is competent to show that it is fraudulent. Undoubtedly, if it appear from the reports he is required to make, or from other evidence, that he did not act in good faith, his right to credit in his account would be denied, but otherwise it must be allowed. (Rev. Stat., 236, 250, 277, 184, 269, 191; 3 Op., 1, 15, 18; 10 Op., 48; 14 Op., 419; 1 Lawrence, Comptroller's Decisions, Appendix, ch. XII.)

There are well-settled principles supported by abundant authority, the analogy of which shows that when the statute expressly requires an officer to decide a question of fact, and act upon the decision so made, and in express terms or by necessary inference shows that the finding was intended to be conclusive for all purposes connected therewith, the validity of the decision cannot, as a general rule, be made to depend on the degree of wisdom with which it was made, nor upon the sufficiency of the evidence upon which it was founded. *United States vs. Speed*, 8 Wall., 83, citing *Philadelphia and Trenton R. R. Co. vs. Stimpson*, 14 Pet., 448; *Martin vs. Mott*, 12 Wheat., 19; *Royal British Bank vs. Turquand*, 6 Ellis & Blackburn, 327; *Maclae vs. Sutherland*, 25 Eng. Law & Eq., 114; *Ross vs. Reed*, 1 Wheat., 482. And see *Exigency Case*, ante, p. 92; *Wilkes vs. Dinsmore*, 7 How., 89; *Cobb's Case*, 7 Court Claims, 470; *Thompson's Case*, 9 *Id.*, 188; 1 Lawrence, Comptroller's Decisions, Appx., ch. XII, p. 543; *Bender's Case*, *Id.*, 317, 346; *Seward's Case*, 2 Lawrence, Comptroller's Decisions, 59, 69; *Eveleth's Case*, *Id.*, 20; *Fletcher vs. Peck*, 6 Cranch, 133; 3 Op., 1, 15, 18; 5 Op., 387; *Comegys vs. Vasse*, 1 Pet., 193; *Dorsheimer vs. United States*, 7 Wall., 173; *Yorktown Centennial Case*, *post*, p. 141. There may be such gross negligence as to raise a presumption of fraud. On this subject there is a rule of the civil law: *Magna negligentia culpa est, magna culpa est dolus*. Wharton's Negligence, sec. 6, 23, 325; L., 1 Dig. (47.4); Shear-

man & Redfield, Negligence, 2, 3, 37; 3 Op., 1, 15, 18; 14 Op., 419; 13 Op., 148; 1 Op., 598, 624, 679; 2 Op., 625, 650. But there is no suspicion of fraud here. When the consul furnishes the evidence which the law requires, this should be a "satisfactory voucher." (9 Op., 430.)

The consul is entitled to credit for the voucher.

THEASURY DEPARTMENT,

First Comptroller's Office, April 4, 1882.

IN THE MATTER OF EXPENDITURES FOR THE CENTENNIAL ANNIVERSARY
OF SURRENDER OF LORD CORNWALLIS.—YORKTOWN CENTENNIAL
CASE.

1. The act of Congress of June 7, 1880 (21 Stat., 163), provides for the erection of a monument at Yorktown "adorned with emblems of the alliance between the United States and His Most Christian Majesty, and inscribed with a succinct narrative of the surrender of Earl Cornwallis to His Excellency George Washington, Commander-in-Chief of the combined forces of America and France," &c.
2. This act appropriates \$100,000 for that purpose, "to be expended under the direction of the Secretary of War"; it provides for a committee to select the site for the monument, "and to make all necessary arrangements for such a celebration, by the American people, of the centennial anniversary of the battle of Yorktown on the 19th day of October, 1881, as shall befit the historical significance of that event and the present greatness of the nation."
3. The joint resolution approved February 18, 1881, authorizing and requesting the President to "extend to the government and people of France and the family of General La Fayette an invitation to join the government and people of the United States in the observance of the centennial anniversary of the surrender of Lord Cornwallis at Yorktown, Virginia," appropriated for the carrying out of that purpose the sum of \$20,000, "to be expended under the direction of the Secretary of State."
4. Vouchers approved by the Secretary of State for expenses of "German guests," invited by him under authority of the resolution of February 18, 1881, which provides for the invitation, reception, and entertainment of "the government and people of France and the family of General La Fayette," are authorized by the general language of that resolution, and therefore approved by the Comptroller.
5. The joint resolution of February 18, 1881, was only necessary for three purposes: first, to request the President to invite the French guests; second, to appropriate \$20,000 to pay expenses; and, third, to designate the Secretary of State to expend that sum. The latter was required to expend it "for the purpose of carrying out the provisions of this resolution." This resolution had the same purpose as to a general celebration as that of the act of June 7, 1880, with the added one of specially inviting the French guests; so that in carrying out the purpose of the resolution, the Secretary carried out, not only it, but the prior act also.
6. The purpose expressed by Congress, the character of the occasion, and the usages applicable thereto, all considered together, at least authorized, if they did not require, invitations, not only of American people, but of foreigners as well. The Secretary of State was invested with a general power to invite guests o

any or all nationalities. This was an incident of the duty imposed on him of expending the appropriation "for the purpose of carrying out the" objects of the laws on the subject.

7. The special power of the President to invite the French guests did not except as to that limit the general authority otherwise given to invite guests. The duty to invite guests in the discretion of those charged with executing the laws was incidental and implied; but that which is implied is as firmly and affirmatively enjoined or authorized as that which is required in express terms. The general duty thus affirmatively existing can only be abridged either by a provision which, in negative terms, does so, or by a provision the affirmative terms of which imply an abridgment.
8. There is a provision for inviting the French guests, in affirmative terms, which by implication, and as to them, abridges the general power of invitation by making it the duty of the President to invite them. This is a construction necessary to carry out the objects of the laws. Without this construction there would be no authority to invite American people, and by a well-known rule that construction is to be adopted which will give effect to the statutes.
9. If an appropriation should be applied to objects not authorized, vouchers therefor could not be allowed; but the accounting officers will not, as a general rule, revise the action of an officer expressly invested by statute with a clear discretionary authority to determine the objects for which money shall be expended.
10. The joint resolution of February 18, 1881, gave the Secretary of State a discretionary authority in selecting the objects on which he would expend the appropriation therein made. His discretion cannot lawfully be and will not be interfered with. The objects to which he applied the appropriation were clearly within his discretion, and he was the appropriate judge thereof. Effect will be given to his approval of the expenditure.

The act of Congress of June 7, 1880 (21 Stat., 163), provides for the erection of a monument at Yorktown "adorned with emblems of the alliance between the United States and His Most Christian Majesty, and inscribed with a succinct narrative of the surrender of Earl Cornwallis to His Excellency George Washington, Commander-in-Chief of the combined forces of America and France," &c. It appropriates \$100,000 for that purpose, "to be expended under the direction of the Secretary of War"; it provides for a committee to select the site for the monument, "and to make all necessary arrangements for such a celebration, by the American people, of the centennial anniversary of the battle of Yorktown, on the 19th day of October, 1881, as shall befit the historical significance of that event and the present greatness of the nation."

And see joint resolution of March 3, 1881 (21 Stat., 522).

The "joint resolution authorizing and requesting the President to extend to the government and people of France and the family of General La Fayette an invitation to join the government and people of the United States in the observance of the centennial anniversary of the surrender of Lord Cornwallis at Yorktown, Virginia," approved February 18, 1881, provides:

"That the President be, and is hereby, authorized and requested to extend to the government and people of France and the family of General La Fayette a cordial invitation to unite with the government and people of the United States, on the nineteenth day of October, eight-

een hundred and eighty-one, in a fit and appropriate observance of the centennial anniversary of the surrender of Lord Cornwallis at Yorktown. And for the purpose of carrying out the provisions of this resolution the sum of twenty thousand dollars is hereby appropriated out of any money in the Treasury not otherwise appropriated the same or so much thereof as may be necessary to be expended under the direction of the Secretary of State."

The proper disbursing clerk reported his expenditures under these acts and resolutions to the Fifth Auditor. As to certain vouchers for expenses of "German guests," a question arises growing out of the language of the resolution of February 18, 1881, which provides for "the government and people of France and the family of General La Fayette." The prices paid for sundry articles and the objects of expenditure are approved by the Secretary of State. The papers are submitted to the First Comptroller for his decision.

DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

The two questions which arise for consideration are, whether the acts and joint resolutions of Congress relating to the celebration of the centennial anniversary of the battle of Yorktown authorize expenditures for German guests; and who shall determine the objects of expenditure, and the prices to be paid therefor. It has been suggested that the acts and resolutions referred to did not authorize the invitation of German guests.

I. The acts and resolutions, however, did authorize the invitation of German guests and the payment of their expenses. The act of June 7, 1881 (21 Stat., 163), provides for a committee "to make all necessary arrangements for such a celebration by the American people, of the centennial anniversary of the battle of Yorktown * * * as shall befit the historical significance of that event and the present greatness of the nation." If to this had been added an appropriation for expenses, and the committee had been authorized to expend it in their discretion in conducting the celebration, it cannot well be doubted but they might have invited the rulers of all the nations to participate in the grand event, and might have paid their expenses. True, the statute says, "a celebration by the American people," but it also says, "such a celebration by the American people * * * as shall befit the historical significance of that event and the present greatness of the nation." The word celebrate, from its original derivation, implies an invitation to guests to participate—*καλεῖ-εἶν*, defined *dicere, prædicare*, to call, to declare, to proclaim, to make known or renowned, to spread the praise, fame, or reputation, to treat as worthy of honor with public ceremony, with solemn rites. (1 Richardson's Dictionary, 283.)

Celebration—an assembling together in great numbers, a numerous assemblage, concourse, as, *hominum cætus et celebrationes*. Cic. Off., 1, 4, 12.

Sacred and profane history are full of such celebrations. (Esther, ch. ix, v. 20, 22; Matt. ch. xxii, v. 4, 9; xxv, v. 10; St. John, ch. ii, v. 1, 2; Rev., ch. xix, v. 9.)

The American usage, both social and public, sanctions if it does not require invited guests at a celebration. Marriage is celebrated with the presence of invited guests, a practice venerable with age. (Nuptias, Liv. 36, 11; *solemnia nuptiarum*, Tac. A. 11, 26 fin.; *officium nuptiarum*, Suet. Claud., 26.) A married couple celebrate their silver and golden weddings in the same way. The Fourth of July is "celebrated with bonfires, festivals, and rejoicings." Our holidays are celebrated with invited guests. "Decoration Day" and Emancipation Proclamation are thus celebrated. The Centennial International Exhibition was celebrated with many foreign invited guests. (Act June 1, 1872, 17 Stat., 203; act June 5, 1874, 18 Stat., 53; act June 16, 1874, 18 Stat., 76; act March 3, 1875, 18 Stat., 375; act February 16, 1876, 19 Stat. 3; act April 17, 1876, 19 Stat., 34; act May 1, 1876, 19 Stat., 45; act May 13, 1876, 19 Stat., 213; act July 20, 1876, 19 Stat., 214; act March 3, 1877, 19 Stat., 370.)

The enlightened sentiment of the American people, if not that of the civilized world, would have been shocked if all the world had been excluded, except our own citizens, from this Yorktown celebration of world-wide historic interest and significance and in which the people of all nations were interested. This would be selfish in the extreme, and would by no means "befit the historical significance" of that event.

The committee were not indeed authorized, as in the case supposed, but a broader authority was given to the Secretary of State by the joint resolution of February 18, 1881. By it the President was requested to "extend to the government and people of France and the family of General La Fayette a cordial invitation to unite with the government and people of the United States, on the 19th day of October, 1881, in a fit and appropriate observance of the centennial anniversary of the surrender of Lord Cornwallis at Yorktown." This is to be read in connection with the former action of Congress on the subject to show the purpose of Congress. This purpose is shown in two distinct declarations: one, that there should be "such a celebration, by the American people * * * as shall befit the historical significance" of the event named; the other, that there should be "a fit and appropriate observance of the * * * anniversary" named. As a mark of special favor and for special historic reasons Congress requested the President to invite "the government and people of France and the family of General La Fayette" to participate. This was the only distinct specific provision on the subject of invitations. It was to be "a celebration by the American people," but no specific distinct provision was made for inviting any American citizen to participate. It cannot be supposed that the American people *en masse*, or such as might choose to assemble, were to take charge of the ceremonies, or that there was to be no super-

vision. The celebration was determined on by the act of June 7, 1880. The joint resolution of February 18, 1881, was only necessary for three purposes: first, to request the President to invite the French guests; second, to appropriate \$20,000 to pay expenses; and, third, to designate the Secretary of State to expend it. The resolution required him to expend it "for the purpose of carrying out the provisions of this resolution." This resolution had the same purpose as to a general celebration as that of the act of June 7, 1880, with the added one of specially inviting the French guests, so that in carrying out the purpose of the resolution, the Secretary carried out, not only it, but the prior act also. But if he carried out the purposes of the resolution alone, it had two purposes covering the whole subject, one of which it declares to be "a fit and appropriate observance of the * * * anniversary" celebration, and a special mark of favor by a particular mode of inviting the French guests. When a particular mode of making this one invitation was thus provided, no other mode could be adopted as to that. It became, on well-settled principles, the only mode.

But, as already shown, the purpose expressed by Congress, the character of the occasion, and the usages applicable thereto, all considered together, at least authorized, if they did not require, invitations, not only of American people, but of foreigners as well. The Secretary of State was invested with a general power to invite guests of any or all nationalities. This was an incident of the duty imposed on him of expending the appropriation "for the purpose of carrying out the" objects of the laws on the subject.

The special power of the President to invite the French guests did not except as to that limit the general authority otherwise given to invite guests. The duty to invite other guests in the discretion of those charged with executing the laws has been shown. The duty was incidental and implied; but that which is implied is as firmly and affirmatively enjoined or authorized as that which is required in express terms. The general duty thus affirmatively existing can only be abridged either by a provision which, in negative terms, does so, or by a provision the affirmative terms of which imply an abridgment. Authorities upon this subject have been elsewhere cited. (Territorial Court Case, *post*, p. 148; Huidekoper's Case, 2 Lawrence, Comptroller's Decisions, 362; District Land Office Case, *Id.*, p. 415.)

There is a provision for inviting the French guests, in affirmative terms, which by implication, and as to them, abridges the general power of invitation by making it the duty of the President to invite them. This is a construction necessary to carry out the objects of the laws. Without this construction there would be no authority to invite American people, and by a well-known rule that construction is to be adopted which will give effect to the statutes.

It must be concluded, then, that the German guests were duly invited by authority of law.

II. The remaining question is, who shall determine (1) the objects of expenditure and (2) the prices to be paid therefor? The act of February 18, 1881, appropriates \$20,000 "for the purpose of carrying out" its purposes, being those proper for "a fit and appropriate observance of the * * * anniversary." This money, as the statute says, is "to be expended under the direction of the Secretary of State." He is charged with the duty of expending the money by such agencies as he may in his discretion appoint, subject to the laws applicable thereto. The accounting officers are charged with the duty of settling the accounts of the disbursements. (Rev. Stat., 236, 250, 277, 269, 191.)

1. When a statute expressly gives to an officer a clear discretionary authority to select the objects upon which an appropriation shall be expended, his decision thereon is, as a general rule, conclusive. The authorities which show this effect have been elsewhere cited. (Seaman-Relief Case, *ante*, p. 158.)

Official discretion is not generally subject to review. This is illustrated in cases of injunctions in courts. (High on Injunctions, 6, 72, 196, 403, 763, 797; *Gaines v. Thompson*, 7 Wall., 347; *Litchfield v. The Register*, 9 Wall., 575.)

The rule at law is illustrated in cases on error in judicial courts. (Ex parte *Bradstreet*, 8 Pet., 588; *Thomas v. Harvie*, 10 Wheat., 146; *Johnston v. Jones*, 1 Black, 209, 227; *Wylie v. Coxe*, 14 How., 1; *P. & T. R. R. Co. v. Stimpson*, 14 Pet., 448, 463; *Breedlove v. Nicolet*, 7 Pet., 413; *Boyle v. Zacharie*, 6 Pet., 648; *Poultney v. City of La Fayette*, 12 Pet., 472; *Sims v. Hundley*, 6 How., 1; *Day v. Woodworth*, 13 How., 363; *Wright v. Hollingsworth*, 1 Pet., 165; *Bradstreet v. Bradstreet*, 7 Pet., 634.)

Judicial discretion conferred by law will not be reviewed "unless a clear abuse of that discretion or some manifest injustice is shown." (*Smith v. Billet*, 15 Cal., 23.)

The rule in equity seems to be that an appellate court will not interfere with the discretion of an inferior court, unless manifest injustice has been done. (*Dole v. Northrop*, 19 Wis., 249; *Eusley v. Tucker*, 10 Ark., 527; *Billen v. State*, 5 Humph., 567; *Hipp v. Bissell*, 3 Texas, 18; *Van Ness v. Bush*, 14 Abb. Pr., 331; *Cullum v. Cundiff*, 20 Mo., 522; *Cook v. Spears*, 2 Cal., 409; *Travis v. Buyer*, 24 Barb., 614; *Connor v. Pugh*, 18 How., 394; *Fairchild v. Dean*, 15 Wis., 206; *Bailey v. Taaffe*, 29 Cal., 422; *Broaders v. Nelson*, 16 Cal., 79; *Wheeler v. Smith*, 13 Iowa, 564; *Rus v. War Eagle*, 14 *Id.*, 363; *Hook v. Brooks*, 24 Ga., 175; *Gerham v. Lockett*, 6 B. Mon., Ky., 146; *State v. Bird*, 22 Mo., 470; *Trice v. Hannibal, &c., R. R. Co.*, 35 Mo., 416; *Ferguson v. Hannibal, &c., R. R. Co.*, *Id.*, 452; *Florey v. Uhrig*, *Id.*, 517; *Watson v. Walker*, 33 N. H., 131; *People v. Northern R. R. Co.*, 53 Barb., N. Y., 98; *Forrest v. Forrest*, 25 N. Y., 501; 6 Duer, 102; *State v. Bogue*, 9 Ired. N. C. L., 360; *Merriam v. Barton*, 14 Vt., 501.)

Where a justice in New York in a cause before him suspended the

trial after it had been commenced for twenty hours, in order to allow one of the parties to produce further proof, held: an abuse of discretion, and sufficient for reversing the judgment. (*Green v. Angel*, 13 Johns., N. Y., 469; *Fry v. Bennett*, 9 Abb. Pr., 45; *Sanders v. Johnson*, 6 Blackf., 50; *Byrd v. Johnson*, 38 Ga., 113; *Johnson v. Holt*, 3 Ga., 117; *Rich v. Hathaway*, 18 Ills., 548; *King v. Pearce*, 40 Mo., 222; *Burton v. Power*, 4 Texas, 380.)

When discretionary power is grossly, palpably abused, it may be reviewed by appellate courts on error or otherwise. (*Greenleaf v. Roe*, 17 Ills., 474; *Rich v. Hathaway*, 18 Ills., 548; *Diebold v. Powell*, 32 Ohio St., 175; *Montgomery v. Swindler*, 32 Ohio St., 226; *Bean v. Green*, 33 Ohio St., 450; 3 Op., 1, 15; *United States v. Jones*, 8 Pet., 375, 382; *United States v. Macdaniel*, 7 Pet., 1; *United States v. Fillebrown*, 7 Pet., 28; *United States v. Randolph*, 9 Pet., 12; *Byrd v. Johnson*, 38 Ga., 113.)

As to accounting officers, see Opinions Attorneys-General: *Butler*, August 8, 1836 (3 Op., 148); *Wirt*, March 20, 1823 (1 Op., 528); *October 20, 1823* (1 Op., 624); *November 25, 1824* (1 Op., 699); *Butler*, March 26, 1824 (2 Op., 625); *May 3, 1834* (2 Op., 650); *October 10, 1835* (3 Op., 1, 15, 18); *Legaré*, August 4, 1842 (4 Op., 80); *Williams*, July 23, 1874 (14 Op., 419).

The accounting officers, adopting the analogy of these principles, as a general rule, will not revise the action of an officer expressly invested by statute with a clear discretionary authority to determine the objects for which money shall be expended. The discretion given by a general or special statute to an officer in the expenditure of money is always subject to the restraints imposed by general statutes, and general principles of public policy; and of these accounting officers must judge. (3 Op., 17, 18; 4 Op., 249.)

Thus an officer authorized to select agents to carry out the objects of an appropriation, or other statute, and pay them compensation in his discretion, cannot, by selecting as such agent an officer having a salary fixed by law, pay him "additional compensation in any form for any service," because this is prohibited by section 1765 of the Revised Statutes. This is a government of law. (*Floyd Acceptances*, 7 Wall., 666; *United States v. Nicholl*, 1 Paine, C. C. R., 651.) A payment in violation of this section would be subject to review and disallowance by the accounting officers. (*Eveleth's Case*, 2 Lawrence, Comptroller's Decisions, 20. *Converse v. United States*, 21 How., 464, syl. 7; *United States v. Smith*, 1 Bond, C. C. R., 68, syl. 3; *Watkins v. United States*, 9 Wall., 764; *Rev. Stat.*, 236, 277, 269, 191, 184, 187; 3 Op., 18; act June 14, 1878, 20 Stat., 130; 1 Lawrence, Comptroller's Decisions, Appendix, ch. xii.)

On the evidence presented this is not a case for the application of any principle as to the abuse of a discretionary power, nor is there any error of law or fact to correct.

If an appropriation should be applied to objects not authorized, vouchers therefor could not be allowed. (3 Op., 17, 18.)

The authority to make expenditures under discretionary power is very different from that exercised in the approval or allowance of expenditures made by other officers, or of claims or accounts in favor of parties against the United States. These are generally subject to re-examination by accounting officers. (1 Lawrence, Comptroller's Decisions, Appendix, ch. xii; *Gordon v. United States*, 7 Wall., 188.) The expenditures now in question are unlike those under appropriations for contingent expenses. There is nothing in this case for the application of any of the principles last above stated. The joint resolution of February 18, 1881, by its language, its purpose, and the extraordinary character of the expenditures to be made, gave to the Secretary of State a discretionary authority in selecting the objects on which he would expend the appropriation therein made. His discretion cannot lawfully be, and will not be, interfered with. The objects to which he applied the appropriation were clearly within his discretion, and he was the appropriate judge thereof. Effect will be given to his approval of the expenditure.

2. The same principles which apply to the objects of expenditure may sometimes apply to prices paid when the statute clearly and unequivocally shows such intention. An officer having clear, explicit, absolute discretionary authority to make purchases or pay expenses, may regulate the price to be paid either by contract in advance or by paying a *quantum valebant* or a *quantum meruit*. In such case his judgment will not be disturbed, but will be accepted as correct, unless for reasons similar to those already stated as to the objects of an appropriation. The prices paid in cases of expenditure now in question do not call for any revision. Judgment has been properly exercised as to these, and there is no reason for calling in question its prudence.

The vouchers are all approved, the account of disbursements is correct, and will be settled accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, April 5, 1882.

IN THE MATTER OF THE RIGHT OF THE LEGISLATIVE ASSEMBLY OF
THE TERRITORY OF NEW MEXICO TO PRESCRIBE TERMS FOR THE
SUPREME COURT THEREOF.—TERRITORIAL COURT CASE.

1. A territorial legislative assembly is invested with general legislative authority over "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States;" it has, therefore, power to fix the times when, and the places where, the supreme court of the Territory shall be held, unless some act of Congress has in terms, or by clear implication, prohibited the exercise of such power.

2. A provision in the act of Congress which declares that "the supreme court [of such Territory] shall hold a term annually at the seat of government of the Territory," does not take from the legislative assembly the power to require other terms of such court to be held at such times and places as the legislative assembly may by law prescribe.
3. When a plenary authority is given in general terms by statute, other provisions of the same act are not to be deemed as a modification of such authority or as creating an exception thereto, unless such purpose appear by the necessary import of the provisions or by clear inference.
4. When two affirmative provisions in a statute may reasonably be construed as consistent with each other, and so that both may stand together and have full effect, the one should not be deemed a modification of the other.
5. Courts created in the Territories by act of Congress are "United States courts" within the meaning of the acts making appropriations for such courts, though not "in the sense of the Constitution."

March 11, 1882, the chief justice of the supreme court of the Territory of New Mexico addressed a letter to the Hon. Benjamin Harris Brewster, Attorney-General of the United States, stating that the regular annual sessions of said court have been held commencing in January each year, and that the legislature of the Territory, at the session just ended, passed an act providing for an additional (semi-annual) session of the supreme court of the Territory. He asks whether in case the judges should agree to meet at the time so fixed for this semi-annual session the expenses thereof would be paid by the Government.

March 18, 1882, the Hon. Attorney-General addressed a letter to the First Comptroller, referring to him the question so submitted by the chief justice, and asking to be informed of the Comptroller's view of the matter.

OPINION OF WILLIAM LAWRENCE, *First Comptroller*:

The Revised Statutes contain these provisions:

"SEC. 1850. All laws passed by the legislative assembly and governor of any Territory except in [the] any Territories of Colorado, Dakota, Idaho, Montana, and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect.

"SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. * * * * *

"SEC. 1864. The supreme court of every Territory shall consist of a chief justice and two associate justices, any two of whom shall constitute a quorum, and they shall hold their offices for four years, and until their successors are appointed and qualified. They shall hold a term annually at the seat of government of the Territory for which they are respectively appointed.

"SEC. 1865. Every Territory shall be divided into three judicial districts; and a district court shall be held in each district of the Territory by one of the justices of the supreme court, at such time and place as may be prescribed by law; and each judge, after assignment, shall reside in the district to which he is assigned."

"SEC. 1907. The judicial power in New Mexico, Utah, Washington, Colorado, Dakota, Idaho, Montana, and Wyoming, shall be vested in

a supreme court, district courts, probate courts, and in justices of the peace."

"SEC. 1913. The legislative assemblies of New Mexico, Utah, Washington, Colorado, Dakota, Arizona, and Wyoming Territories, respectively, may organize, alter, or modify, the several judicial districts thereof, in such manner as each legislative assembly deems proper and convenient."

"SEC. 1915. The judges of the supreme court in each of the Territories of New Mexico and Arizona, or a majority of them, shall, when assembled at their respective seats of government, fix and appoint the several times and places of holding the courts in their respective districts, and limit the duration of the terms thereof; but such courts shall not be held at more than three places in any one Territory; and a judge holding court may adjourn the same, without day, at any time before the expiration of a term, whenever in his opinion the further continuance thereof is not necessary."

"SEC. 1918. The legislative assemblies of New Mexico, Washington, Colorado, Dakota, Arizona, and Wyoming Territories may assign the judges appointed for such Territories, respectively, to the several judicial districts thereof, in such manner as each legislative assembly deems proper and convenient."

"SEC. 1934. The supreme court of the Territory of Arizona may hold adjourned terms thereof at any time and place in the Territory agreed upon by a majority of the judges of the court at any regular term thereof. * * *

The act of Congress of June 3, 1874 (18 Stats., 253, sec. 3), "in relation to courts and judicial officers in the Territory of Utah" provides:

"That there shall be held in each year two terms of the supreme court of said Territory, and four terms of each district court at such times as the governor of the Territory may by proclamation fix."

In Montana two terms of the supreme court are held in each year, in conformity to an act of the legislative assembly approved (by the governor) December 30, 1871.

Congress has given to the legislative assembly of New Mexico authority over "all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States," subject to the power of Congress to annul any act which may be passed. The matter of prescribing the times when, and the places where the supreme court shall be held, and of fixing the number of terms thereof in each year, is a "rightful subject of legislation." (4 Op. Att. Gen., 528; Cooley, Const. Lim., [87], 106; *Clinton v. Englebrecht*, 13 Wall., 443.) The only inquiry which arises, therefore, is whether the act of the legislative assembly requiring a session each year in addition to that required by the statute (Rev. Stats. 1864), is "inconsistent with the Constitution and laws of the United States."

The Territorial act is not inconsistent with the Constitution nor with any law of Congress, unless it be the act which declares that "the supreme court * * * shall hold a term annually at the seat of government of the Territory." If by this Congress intended there should be no more than one term of the court in each year, the Territorial act is inconsistent therewith and void. If the purpose of Congress was only to impose an

absolute obligation on the supreme court to hold at least one term in each year, and that at the seat of government, leaving to the legislative assembly a discretionary authority to require an additional term or terms to be holden either there or elsewhere, then the Territorial act in question is valid. Congress having in general terms given to the legislative assembly general legislative powers, any exception thereto must be made to appear with reasonable certainty. General words are to have a general application, and their effect cannot be taken away by words which create, by mere inference or doubtful construction, an exception. (Broom, Leg. Max., 647; Potter's Dwaris, Stat., 219; 2 Inst., 395; Rex v. Allen, 15 East, 340; Rex v. Inhabitants of Cumberland, 6 T. R., 194; 3 B. & P., 354.)

It is generally to be taken that the legislature only meant to modify or repeal the provision of any former statute in those cases only where such objects are expressly declared. It is always to be presumed that when the legislature entertains an intention it will express it; and that, too, in clear and explicit terms. (Potter's Dwaris, Stat., 219.) "Plenary power in the legislature for all purposes is the rule. A prohibition to exercise a particular power is an exception. In inquiring, therefore, whether a given statute is constitutional [authorized] it is for those who question its validity to show that it is forbidden." (People v. Draper, 15 New York, 543.)

The statute (Rev. Stats., 1851) does not merely give the legislative assembly power over "a particular subject only." If it did so, the power, though given in general terms, would apply only to matters *ejusdem generis*, and be "confined to that subject." (Broom, Leg. Max., 647; Chegary v. Mayor, 13 N. Y., 220.) The power is given in general terms, comprehending, by the import of the terms used, all subjects, and the act giving the power is to be construed accordingly, except in so far as there may clearly appear a modification or exception to them. It is not permitted "by conjecture to take out of the effect of general words" authority "which those words are always considered as comprehending." (Broom, Leg. Max., 649; Church v. Mundy, 15 Ves., 396; Doe d. Howell v. Thomas, 1 Scott, N. R., 371; Moore v. Magrath, 1 Cowp., 12; Shep. Touch. Atherly—79 n.)

Another material consideration to be regarded is, that the statute which gives the legislative assembly its power, and that which requires the supreme court to "hold a term annually at the seat of government", are both affirmative in their terms. It is a general rule that "an affirmative statute does not repeal a precedent affirmative statute, and if the substance of both may stand together they should both be enforced." (Sedgwick, Stat. and Const. L., 2d ed., 32; Dwaris, Stat., 475; Potter's Dwaris, 74; Foster's Case, 11 Rep., 63; Wallace v. Holmes, 9 Blatch. C. C., 65; Uncas National Bank v. Rith, 33 Wisc., 339; Brown v. Bagan, 24 Ind., 194; State v. McCullough, 3 Nev., 202; Leake v. Blasdell, 6 Nev., 40; Com. v. Cancaunon, 3 Brewst., 344; People v. Ingham Co.,

20 Mich., 103.) There are cases for the application of the maxim *expressio unius est exclusio alterius*, in which an affirmative statute may, by implication, negative that which has been given in another affirmative statute. (Sedgwick, Stat. and Const. L., 30; Foster's Case, 11 Rep., 64; District Township v. Dubuque, 7 Clarke, Iowa, 262; New Haven v. Whitney, 36 Conn., 373; Childs v. Smith, 55 Barb., 45; Smith v. Stevens, 10 Wall., 321; Perkins v. Thornburg, 10 Cal., 189; Walkins v. Warrell, 20 Ark., 410; Pembroke v. Epsom, 44 New Hampshire, 113; State v. Taylor, 15 Ohio St., 132.) But such result can only arise by a "necessary implication" which raises so strong a probability of intention that a contrary intention cannot be supposed. (People v. Draper, 15 New York, 558; 1 Ves. & B., 466.) But when, as in this case, two affirmative provisions are found in the same statute (act September 9, 1850, sections 7 and 10, 9 Stats., 449, now embraced in Rev. Stats., 1851, 1864),—one by which Congress gives to the Territorial assembly general legislative powers (sec. 7), and the other declaring that the Territorial supreme court "shall hold a term at the seat of government of the Territory annually" (sec. 10),—the latter provision is, upon clear authority, in no sense a limitation or modification of the legislative authority given by the former, except only to the extent that no Territorial statute can relieve the court of the duty to hold one term annually at the seat of government. The plain effect of the words employed in the statutes is, that there is but one exception or limitation on the general power of the legislative assembly as to the sessions of the supreme court, namely, that there must be, as required by Congress, one "term annually at the seat of government." In all other respects, as to the times when and places where said court shall hold sessions, the power of the legislative assembly is plenary and unlimited. The imposition of a single limitation on a general power leaves the latter operative in all respects except as to that limitation.

Upon the language of the statutes cited, and the rules of construction stated, Congress has, in effect, said that "the legislative assembly may by virtue of its general legislative power fix the times when and the places where sessions of the supreme court may be held, subject to only one limitation on such power, namely, that the duty imposed on the court by Congress to hold at least one term each year at the seat of government cannot be abrogated." It is manifest that the purpose of Congress was to secure absolutely at least (1) one term of the supreme court annually, and (2) that term at the seat of government, leaving the requirement for other terms and places to the discretion of the legislative assembly.

The act of March 3, 1881 (21 Stats., 454) makes an appropriation for "expenses of the United States courts." This includes Territorial courts. (5 Op., 678; 6 Op., 388; 7 Op., 303, 610; 1 Lawrence, Compt. Dec., 306; Cox v. United States, 14 C. Cls., 513.) No special appropriations have been made for the supreme and district courts in the Terri-

tories except for the courts in Utah. For the latter, appropriations have been made to pay expenses incurred while they are transacting business under the Territorial laws. The Territorial courts are not courts of the United States "in the sense of the Constitution." (*Clin-ton v. Englebrecht*, 13 Wall., 447.)

The organic acts of the several Territories, except Washington, provide that the first six days of every term of the respective district courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under the Constitution and laws of the United States. (Rev. Stats., 1910.) In the year 1821 the Comptroller decided that, while so engaged, the expenses should be paid by the United States. Whether any particular time is now set apart for such business is not known here; but in all the Territories the expenses of whole terms are charged to the United States, on the ground that trials of government cases occur throughout the terms interspersed with other business. Section 1874 of the Revised Statutes declares that the expenses of county courts held by United States judges in the Territories shall in no case be chargeable to the United States. And section 1871 declares that only one clerk of a district court in a judicial district shall be entitled to compensation from the United States. From these provisions it may be inferred that Congress is aware of the fact that expenses of the supreme and district courts are paid by the United States out of the general appropriations for expenses of courts.

The proper expenses of the term of court provided for by the act of the Territorial legislative assembly can lawfully be paid from the appropriation applicable thereto.

TREASURY DEPARTMENT,

First Comptroller's Office, April 6, 1882.

IN THE MATTER OF THE MODE OF CERTIFYING ACCOUNTS OF CHIEF
SUPERVISORS OF ELECTIONS.—ELECTION SUPERVISORS' CASE.

1. Accounts of chief supervisors of elections may be certified under the acts of February 28, 1871 (16 Stats., 438, sec. 14; Rev. Stats., 2031), and August 16, 1856 (11 Stats., 49; Rev. Stats., 846), by a judge of the proper United States circuit or district court.
2. The act of 1871, by referring to that of 1856 for the mode of certifying accounts, in effect incorporates the latter into the former for the purpose stated.
3. When a statute refers to and adopts another and prior statute for the purpose of prescribing the manner in which a particular thing shall be done, a modification of the former statute, as affecting other subjects, leaves it in force as to the purposes for which it was so adopted.

The act of February 28, 1871 (16 Stats., 438, sec. 14; now Revised Statutes, 2031), creating the office of chief supervisor of elections provided that the accounts of such supervisors shall "be made out, verified, examined, and certified, as in the case of accounts of commissioners [of

the circuit courts], save that the examination or certificate required may be made by either the circuit or district judge." Accounts of commissioners of the circuit courts were, in 1871 (Rev. Stats., 846; act August 16, 1856; 11 Stats., 49), certified by either a circuit or district judge, and so continued when the Revised Statutes were enacted, June 22, 1874. But subsequently the act of February 22, 1875 (18 Stats., 333), was passed requiring them to be certified "by a circuit or district court, and in the presence of the district attorney or his sworn assistant." This later act does not mention chief supervisors.

The question is submitted to the First Comptroller to decide whether accounts of chief supervisors of elections are to be certified by a judge of the circuit or district court, or by a circuit or district court in the presence of the district attorney.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Accounts of chief supervisors of elections may be certified by the judge of the proper circuit or district court of the United States. The statute does not require such accounts to be certified by the court. The act of February 28, 1871, creating the office of chief supervisor of elections, required the accounts of these officers to be certified in the same manner that the accounts of circuit court commissioners were then required, by the act of August 16, 1856 (11 Stats., 49; now Rev. Stats., 846), to be certified; namely, by a judge—not by a court. The act of 1871 adopted the act of 1856 in respect of the mode of certifying such accounts. In *Ludlow's Heirs v. Johnson* (3 Ohio, 572), it is said that "when in one statute a reference is made to an existing law in prescribing the rule or manner in which a particular thing shall be done * * * the effect generally is" to "continue in force the statute referred to * * * for the purpose of carrying into execution the statute in which the reference is made. For this purpose the law referred to is, in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues will remain a part of it, although the one referred to should be repealed. Such repeal would no more affect the referring statute than a repeal of this latter would the one to which reference is made." The same principle is sanctioned in *Stall's Lessee v. Macalester* (9 Ohio, 22; see also *Fort v. Burch*, 6 Barb., 65; *Livingston v. Harris*, 11 Wend., 329; *Potter's Dwaris*, 218; *Rex v. Justices*, 2 T. R., 504; *Wheatley v. Thomas*, Raym., 54; *Reg. v. Recorder*, 9 A. & E., 877).

The act of February 22, 1877, did not expressly repeal the act of 1856. It changed the mode of certifying accounts from certification by a judge to certification by a court; and so to that extent the repeal of the authority of the judge was by clear implication. But the fact that the act of 1876 specifically named accounts of clerks of courts, marshals, district attorneys, and commissioners of circuit courts, and did not mention

those of chief supervisors of elections, carries with it a clear implication that the latter were not intended to be affected by the change.

Certificates made by a judge are not conclusive on accounting officers. Extraordinary expenses incurred by ministerial officers in executing the laws of the United States, the payment of which is not specifically provided for, may be paid when allowed by the President under the special taxation of the proper district or circuit court. (Act February 18, 1875; 18 Stat., 318.)

Chief supervisors of elections will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, April 9, 1882.



IN THE MATTER OF THE LEGALITY OF ALLOWING COMMISSIONS TO A POSTMASTER ON DISBURSEMENTS OF MONEY APPROPRIATED FOR CONSTRUCTION OF COURT-HOUSE AND POST-OFFICE BUILDING AT PLACE OF LOCATION OF A COLLECTOR OF CUSTOMS.—HUIDEKOPER'S CASE (SECOND).

1. The decision in Huidekoper's Case (2 Lawrence, Compt. Dec., 351) reconsidered and affirmed.
2. Section 255 of the Revised Statutes authorizes the Secretary of the Treasury, subject to the restrictions of section 3657, to designate *any* bonded officer as agent to disburse money appropriated for the construction of public buildings "within the district of such officer." A postmaster has no *district* within the meaning of this statute, and for this reason cannot, by virtue of this section, be appointed such disbursing agent.
3. Sections 3657 and 3658 provide that the *collectors of customs* in the several collection districts shall act as disbursing agents for the payment of all moneys appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals; and that where there is no collector at the place of location of any such work, the Secretary of the Treasury may appoint a disbursing agent for the payment of such moneys.
4. The unlimited choice as to bonded officers, conferred upon the Secretary by section 255, is so restrained by section 3657 that the Secretary has no authority to appoint any other bonded officer than the collector of customs to act as disbursing agent of the moneys appropriated for the construction of a custom-house, court-house, post-office, or marine-hospital building at the place of location of such collector.
5. A postmaster cannot, under the provisions of sections 255, 3657, and 3658 of the Revised Statutes, construed together, be appointed disbursing agent of moneys appropriated for the construction of a United States court-house and post-office building, when there is a collector of customs located at the place where such building is to be erected.
6. It being the duty of the collectors of customs to disburse all moneys appropriated for the construction of specified buildings, no other bonded officers can be designated to disburse such moneys. A particular provision in a statute operates as a limitation of a general provision concerning the same subject-matter.
7. When a statute requires a thing to be done in a particular form or by a particular officer or person, the requirement is equivalent to a prohibition against doing it in any other form or by any other officer or person.

8. When the law seems reasonably clear against a claim, it is a safe general rule for accounting officers to disallow it. Congress can always, and the courts generally, grant relief in case of disallowance by the accounting officers. But the allowance of an unauthorized claim is a wrong to the government for which there may be no remedy.

August 10, 1880, the Secretary of the Treasury appointed H. S. Huidekoper, who is postmaster at Philadelphia, Pa., "disbursing agent of such funds as may be advanced" to him "on account of the appropriation [made by act of June 16, 1880, 21 Stats., 259] for construction of the United States court-house and post-office building at Philadelphia, * * * at a compensation of one-fourth of one per centum on the amount disbursed." The appointee gave bond in due form as such disbursing agent; and in September, October, and November, 1880, he received \$124,000, of which, to December 31, 1880, he disbursed \$100,365.68. On this amount, his commissions for disbursement were allowed by the First Auditor in his report of March 23, 1881. During the period of the appointment and service aforesaid there was a collector of customs at Philadelphia, which is the "place of location of" the court-house and post-office building referred to.

The question arose in the settlement of Mr. Huidekoper's account, whether he was entitled to the commissions or any part thereof allowed by the First Auditor.

July 5, 1881, the First Comptroller decided that Mr. Huidekoper was not entitled to such commissions, and that they could therefore not be allowed. (Huidekoper's Case, 2 Lawrence, Compt. Dec., 351.)

April 12, 1882, Mr. Huidekoper addressed a letter to the Secretary of the Treasury, asking that "a hearing be given" him "in this matter." April 15, 1882, this letter was referred by the Secretary to the First Comptroller.

Mr. H. S. Huidekoper submitted the following:

"As regards the law in the matter, permit me to call your attention to three acts of Congress:

"First. That of 12th June, 1858, in which it is declared that collectors of customs shall act as disbursing agents;

"Second. That of 28th July, 1866, in which it is declared that where there is no collector any person may be appointed; and

"Third. That of 3d March, 1869, in which it is declared that the Secretary of the Treasury may designate any officer of the United States, under bond, to be disbursing agent.

"Under the last act referred to (which, of course, invalidates the other two in so far as they are in conflict), I believe that postmasters have been appointed disbursing agents in all the large cities of the United States for numbers of years past, and that there has been no question heretofore as to the legality of their appointment or as to the propriety of their serving in this capacity.

He also submitted an opinion of the Attorney-General, dated October 15, 1881. This opinion refers to the appointment, March 3, 1873, of the postmaster at New York as agent to disburse funds appropriated for the construction of the court-house and post-office building in that city,

and holds that section 3654 of the Revised Statutes limited compensation on disbursements to an amount not exceeding three-eighths of one per cent.; that it does not fix, but limits the compensation; that the act of March 3, 1875 (18 Stats., 415), enlarges the discretion to authorize an allowance not exceeding the increased per centum therein specified, and that the allowance made of one-fourth of one per cent. was all that could be claimed. It does not allude to section 3657 of the Revised Statutes.

Pursuant to Mr. Huidekoper's request, his claim for commissions will be considered anew.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Sections 255, 3657, and 3658 of the Revised Statutes, taken respectively from the acts of March 3, 1869, June 12, 1858, and July 28, 1866, are as follow:

"SEC. 255. The Secretary of the Treasury may designate any officer of the United States, who has given bonds for the faithful performance of his duties, to be disbursing agent for the payment of all moneys appropriated for the construction of public buildings authorized by law within the district of such officer." (Act March 3, 1869, 15 Stats., 301, 306.)

"SEC. 3657. The collectors of customs in the several collection districts are required to act as disbursing agents for the payment of all moneys that are or may hereafter be appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals; with such compensation, not exceeding one-quarter of one per centum, as the Secretary of the Treasury may deem equitable and just." (Act June 12, 1858, 11 Stats., 327.)

"SEC. 3658. Where there is no collector at the place of location of any public work specified in the preceding section, the Secretary of the Treasury may appoint a disbursing agent for the payment of all moneys appropriated for the construction of any such public work, with such compensation as he may deem equitable and just." (Act July 28, 1866, 14 Stats., 341.)

In the previous consideration of Mr. Huidekoper's claim for commissions as disbursing agent of the money appropriated by the act of June 16, 1880, for the construction of the United States court-house and post-office building at Philadelphia (21 Stats., 259), it was pointed out that Mr. Huidekoper was not entitled to compensation, for the reason that he could not lawfully have been appointed disbursing agent of the moneys appropriated for the construction of the United States court-house and post-office at Philadelphia.

This is the effect of the legislation on the subject as determined by its language.

I. A postmaster, having no *district*, is not within section 255 of the Revised Statutes authorizing the Secretary of the Treasury to appoint a bonded officer as disbursing agent for buildings "*within the district of such officer.*" If this section could authorize the appointment of a col-

lector of internal revenue or other officer having a "district," it clearly cannot authorize the appointment of a postmaster for whom there is no district. This section authorizes the Secretary of the Treasury to designate any bonded officer to disburse money appropriated for the construction of public buildings "within the district of such officer." There are many officers to whom the law assigns districts, for example, collectors of internal revenue (Rev. Stats., 3141, 3142, 3143); marshals (Rev. Stats., 530, 776, 783); district attorneys (Rev. Stats., 767, 3639); registers of district land offices (Rev. Stats., 2234, 2236, 2256, 3639); receivers of public moneys for such land districts (*Id.*); surveyors-general (Rev. Stats., 2207, 2215); collectors, assistant collectors, naval officers, surveyors, appraisers, assistant appraisers of customs (Rev. Stats., 2517, 2523, 2529, 2535, 2536, 2619, 2620); inspectors of the revenue (Rev. Stats., 2605); and pension agents (Rev. Stats., 4778, 4779, 4780, 4764, 4765). Then, there are officers and agents who have no districts, for example, postmasters (Rev. Stats., 3829, 3834); assistant treasurers of the United States and their subordinates (Rev. Stats., 3595, 3600, 3602, 3603, 3612); inspectors of customs at ports (Rev. Stats., 2606, 2605); appraisers of merchandise (Rev. Stats., 2608); agents of the Post-Office Department (Rev. Stats., 4017); and internal-revenue agents (act March 1, 1879, sec. 2, 20 Stats., 329; see also 20 Stats., 66, 140, 187, 190, 297, 329, 356, 479).

Post-offices are established at localities. The statute provides that "every postmaster shall reside within the delivery of the office to which he is appointed" (Rev. Stats., 104). This provision relates to the place of residence of the postmaster. This "delivery" has been called "the neighborhood." (*United States v. Pearce*, 2 McLean, C. C., 14.) But manifestly this is not a "district" within the meaning of the statute being considered. The "neighborhood" to be accommodated by a post-office is not prescribed by law, nor is it in any sense a fixed, or certain, or ascertainable district or locality. It changes with the location of new post-offices, the construction and condition of roads, the facilities for travel, the seasons, the habits of different people, temporary trade or attractions, and a variety of other causes, physical, moral, and immoral. It would pass from the sublime to the ridiculous to call such a floating, varying locality a "district" within the meaning of the statute; and especially when, for many purposes, the law has, for various public purposes, prescribed well-known districts, which meet the idea of the law in its words and purpose. When a statute uses a term or expression descriptive of an object or locality well defined, existing by law, and understood in common usage, such term or expression cannot be extended to objects or localities of a totally different character, having, neither in law nor usage, any definite or fixed designation. (*Wigram on Wills*, proposition second; 1 Greenl. Ev., 287 n.) If the purpose of Congress had been to authorize the appointment of a postmaster, the concluding words of section 255, "within the district of such officer,"

would have been omitted. A postmaster cannot be brought within the words of the statute without a plain disregard of this meaning; and this is not allowable. Plain unambiguous statutes must rest on the words used, "nothing adding thereto, nothing diminishing." (*Rex v. Burrell*, 12 Ad. & El., 468; *L. L. & G. R. R. Co. v. United States*, 92 U. S., 751.)

II. The statute requires the collector of customs at Philadelphia to make the disbursements in question. This results from the language, history, and purpose of the statutes. The act of 1858 (Rev. Stats., 3657) made it the duty of collectors of customs to disburse "all moneys * * * appropriated for the construction of custom-houses, court-houses, post-offices, and marine hospitals * * * in the several collection districts." But as the collection districts embraced the whole country, and as it was found inconvenient for collectors to disburse money at places distant from their offices, the act of 1866 (Rev. Stats., 3658) authorized the appointment of disbursing *agents*, not *officers*, for appropriations for public buildings at places distant from their offices. There is a clear distinction between the position of a disbursing agent and that of a disbursing officer. The statute distinguishes between "disbursing clerks" and special "disbursing agents" "charged with the disbursement of public moneys." A disbursing clerk is an officer. His office is created and his salary is fixed by law. (Rev. Stats., 176, 201, 215, 235, 351, 393, 416, 440.) Special disbursing agents are authorized by law; but they are not, as such agents, officers of the government; and their salary or other compensation, is fixed in the discretion of the head of the department by whom they are employed. Section 3614 of the Revised Statutes recognizes the necessity of employing such agents and authorizes their employment; and hence, when a necessity arises in the execution of a statute for the employment of a disbursing agent, the power to appoint one exists. (*State v. Miller*, 23 Wis., 634; 15 Op. Att. Gen., 322.) The statutes have established many disbursing offices. (Rev. Stats., 56-58, 62, 170, 255, 496, 1153, 1382, 1550, 1563, 1765, 1951, 3144, 3622, 3625, 3646, 3648, 3658, 3677, 4339; *McKnight's Case*, 13 C. Cls., 304; *McKee's Case*, 12 C. Cls., 553; see also 1 Lawrence, Compt. Dec., 2d ed., 592, Appx., Chap. XV.)

Many reasons might exist to render it undesirable or inexpedient to appoint mere agents to disburse moneys, as authorized by section 3658 of the Revised Statutes, for public works at places distant from the offices of collectors of customs. It was to such places that the appointment of disbursing agents was limited; and as the act of March 3, 1869 (Rev. Stats., 255) authorized the Secretary of the Treasury to designate any bonded officer to be a disbursing agent for the payment of moneys appropriated for the construction of public buildings at such places, it is a reasonable inference, arising from the order and purpose of the statutes, that such officers shall be designated, when practicable, in preference to the employment of new agents.

III. The same result follows logically and necessarily from the recognized rules of construing statutes. There is an apparent conflict between sections 3657 and 255 of the Revised Statutes. Section 3657, when read in connection with section 3658, requires collectors of customs, at the place of location of specified buildings, "to act as disbursing agents for the payment of *all* moneys appropriated for" the specified buildings at the localities named. Section 255 says the Secretary of the Treasury may designate any bonded officer to disburse *all* money for the construction of public buildings within the district of such officer. A collector of internal revenue has a district, and if the Secretary should appoint him to disburse money for a building being erected in the locality of the office of a collector of customs, then the latter officer would not, as the statute (sec. 3657) requires, "act as agent for the payment of all moneys" for the specified building. It is to be noticed (1) that sections 3657 and 255 are both affirmative statutes, and (2) that a separate particular authority as to a special class of buildings is by that section given to, or duty imposed on collectors of customs; while there is a general authority, apparently universal, as to buildings generally, in section 255. There are several rules of construction applicable to such cases, each of which may be stated in somewhat different words and illustrated by many cases.

1. The general words of a statute may be restrained according to the subject-matter to which, or persons to whom, they relate. (Broom, Leg. Max., 646; Sedgwick, Stat. and Const. L., 2d ed., 360; Covington v. McNickle, 18 B. Mon., 262.)

2. It is well settled, as a general rule, "that an affirmative statute does not repeal a precedent affirmative statute; and that, if the substance of both may stand together, they should both be enforced." (Sedgwick, Stat. and Const. L., 32; Dwarris, Stat., 475; Potter's Dwarris, 74; Foster's Case, 11 Rep., 63; Wallace v. Holmes, 9 Blatch. C. C., 65; Uncas National Bank v. Rith, 33 Wis., 339; Brown v. Bagan, 24 Ind., 194; State v. McCullough, 3 Nev., 202; Leake v. Blasdell, 6 Nev., 40; Com. v. Cancannon, 3 Brewst., 344; People v. Ingham Co., 20 Mich., 103).

3. Repeals by implication are not favored.

4. Where there are two statutes on the same subject, one more comprehensive than the other, one should, if possible, be construed as having an effect not embraced in the other, so that each may have effect and a separate purpose. (Sedgwick, Stat. and Const. L., 211; N. L. & B. Inst. v. Com., 14 B. Mon., 266; 14 Op., 577; Dodge v. Gridley, 10 Ohio, 176; 1 Greenl. Ev., 301; Doe v. Galloway, 5 B. & Ad., 43, 51; District Land Office Case, 2 Lawrence, Compt. Dec., 2d ed., 415).

5. When there is general authority, and a separate particular authority, the latter is excepted from, and is not controlled by, the former; in such case the maxims, *generalia specialibus non derogant*. (Sedgwick, Stat. and Const. L., 98; 1 Greenl. Ev., 301; Doe d. Smith v. Galloway,

5 B. & Ad., 51; Churchill v. Crease, 5 Bing., 180, 492; Fosdick v. Perrysburg, 14 Ohio St., 472). "A thing given in particular shall not be taken away by general words."

(Dwarris, Stat., 2d. ed., 360, 513; Standen v. University, W. Jones, 26; McFarland v. State Bank, 4 Pike, 410; Felt v. Felt, 19 Wisc., 193; Movius v. Arthur, 95 U. S., 144; Arthur v. Lahey, 96 U. S., 113; Pretty v. Solly, 26 Beav., 606; Zachary v. Chambers, 1 Oregon, 321; Fowler's Case, 3 C. Cls., 43; Homer v. The Collector, 1 Wall., 486; Reiche v. Smythe, 13 Wall., 162; Smythe v. Fiske, 23 Wall., 374; Bishop, Com. Stat. Crim., sec. 126; Brown v. Com., 9 Harris, Pa., 43; Haywood v. Mayor, 12 Ga., 404; Bonley v. Calhoun, 2 W. Va., 416; Beridon v. Barvin, 13 La. Ann., 458; Mobile & Ohio R. R. v. State, 29 Ala., 573; Ellis v. Batts, 26 Texas, 703; State v. McDonald, 38 Mo., 529; State v. Bishop, 41 Mo., 16; State v. Macon, 41 Mo., 453; Luke v. State, 5 Fla., 194; State v. Kitty, 12 La. Ann., 805; St. Martins v. New Orleans, 14 La. Ann., 113; Cate v. State, 8 Sneed, Tenn., 120; Magruder v. State, 40 Ala., 347; State v. Alexander, 14 Rich. S. C. Law, 247; Ottawa v. La Salle, 12 Ill., 339; McDonough v. Campbell, 42 Ill., 490; Hume v. Gossett, 43 Ill., 297; Pearce v. Bank, 33 Ala., 693; State v. Bilansky, 3 Minn., 246.) Hence it has been held, under sections 5331 and 5334 of the Revised Statutes, that an act of rebellion cannot be punished as treason, although within the definition of treason. (See Robbins v. State, 8 Ohio St., 131; London, &c., R. R. v. Limehoare, 3 Kay & J., 123; Thorpe v. Adams, Law R., 6 C. P., 125; Queen v. Champneys, 2 Johns. & H., 31; Fosdick v. Perrysburg, 14 Ohio St., 472.) "A particular enactment must prevail over a general enactment in the same statute; the general enactment must be taken to affect only the other parts of the statute to which it may properly apply." (Pretty v. Solly, 26 Beav., 606; Zachary v. Chambers, 1 Oregon, 321; Sedgwick, Stat. and Const. L., 2d ed., 360, *n*.) "A thing which is given in particular shall not be taken away by general words. * * * *Generalis clausula non porrigitur ad ea quæ specialiter sint comprehensa.*" (Sedgwick, Stat. and Const. L., 361; Potter's Dwarris, 513, 668). "General words do not take away a particular benefit or privilege." (Potter's Dwarris, 219; 2 Inst., 395). "A specification of particulars is an exclusion of generals; or, the expression of one thing is the exclusion of another." (1 Story, Const. § 448; Rule of interpretation, xiii). "It is a general rule in the construction of revenue statutes, that specific provisions for duties on a particular article are not repealed or affected by the general words of a subsequent statute, although the language is sufficiently broad to cover that article." (Movius v. Arthur, 95 U. S., 144.) "When Congress has designated an article by a specific name, and by such name imposed a duty upon it, general terms in a subsequent act, or a later part of the same act, although sufficiently broad to cover such article, are not applicable to it." (Arthur v. Lahey, 96 U. S., 113.)

6. Affirmatives in statutes that introduce a new rule imply a nega-

tive of all that is not within the provision. (1 Kent, Com., 4th ed., 467 n.; Hob. Rep., 293.)

And when a statute limits a thing to be done in a particular form, it includes in itself a negative, to wit:—that it shall not be done otherwise. (Plowd. 206 b.; Smith v. Stevens, 10 Wall., 321; State v. Marlow, 15 Ohio, St., 114.)

Affirmative words sometimes imply a negative of what is not affirmed as strongly as if expressed. *Expressio unius exclusio alterius*. (Cohen v. Hoff, 2 Treadway, 661; Sedgwick, Stat. and Const. L., 2d. ed., 31; District v. Dubuque, 7 Clarke, Iowa, 262; New Haven v. Whitney, 36 Conn., 373.)

Applying these rules, the affirmative provision of section 3657 of the Revised Statutes that “collectors of customs are required” to disburse “all moneys” appropriated for designated buildings is not affected by the provision of section 255 authorizing the Secretary of the Treasury to designate any bonded officer to disburse money appropriated for any public building, because :

a. Section 3657 is an affirmative statute, and is not limited by the affirmative section 255.

b. Section 255 is more comprehensive than section 3657, and the latter and least comprehensive should be construed as having a purpose not embraced in, but as exclusive of, the former.

c. Section 255 gives a general authority, and section 3657 a separate particular authority limited to a special class of cases, and hence is excepted from, and not controlled by the former.

d. Section 3657 limits disbursements in a special class of cases to be made in a particular form, and this includes a negative,—that it shall not be done in any other form.

There is another conclusive reason in favor of the view stated. Ambiguous provisions of statutes are to be construed “by viewing the whole and every part of the act,” and they are to be interpreted *ut res magis valeat quam pereat*. (Broom, Leg. Max., 540, 585; Sedgwick, Stat. and Const. L., 226 n.) If section 3657 of the Revised Statutes does not have the purpose stated, it is wholly without purpose. If it simply gives a discretionary authority to appoint, but does not require the appointment of collectors of customs to disburse in the specified cases, then it has precisely the same purpose and effect as section 255, which gives the same discretionary authority. In this view, this latter section is without any effect, and should have been omitted from the Revised Statutes.

In view of all this, it seems clear that the claimant is not entitled to compensation; there was clearly no authority to advance the money to him. It is a safe rule for accounting officers to adopt, that when the law seems reasonably clear against a claim to disallow it. Claimants can always ask Congress for relief, and in many cases relief may be obtained in the Court of Claims; or on an appeal therefrom in the

Supreme Court. But if accounting officers allow a claim unsupported by law, a wrong might be done to the government which could not be corrected.*

In this case the decision heretofore made by the First Comptroller has not been formally opened up by the Secretary for reconsideration; but the whole subject has been examined as if this had been done. Mr. Huidekoper is not entitled to an allowance by the accounting officers of the compensation claim for the disbursements made by him.

TREASURY DEPARTMENT,

First Comptroller's Office, April 24, 1882.

IN THE MATTER OF COMPENSATION TO MARSHALS WHO ELECT TO RECEIVE "ACTUAL TRAVELING EXPENSES" IN LIEU OF MILEAGE FOR SUMMONING JURORS, UNDER SECTION 829 OF THE REVISED STATUTES.—
DURKEE'S CASE.

1. Under section 829 of the Revised Statutes the fees of a marshal for summoning jurors, including mileage chargeable by him for each service, cannot at any court exceed \$50.
2. When a marshal elects to receive "actual traveling expenses" in lieu of mileage for summoning jurors, he is entitled to the fees prescribed by statute for each service, and his actual and necessary traveling expenses, even when they exceed \$50 at any court.
3. The limitation to \$50 for fees and mileage for summoning jurors prescribed by section 829 Revised Statutes applies in States where jurors are summoned by township officers, as well as where they are not.

At the December term, 1881, of the circuit court of the United States for the northern district of Florida, writs of venire were issued in December, as follows: On the 5th, for 23 grand and 24 petit jurors; on the 12th, for 6 additional grand jurors; and on the 14th, for 20 additional jurors. For "serving venires and summoning" 55 of the jurors (as many as could be found) at this term, the marshal, Joseph H. Durkee, charges

* Congress recognized the correctness of this decision by providing in the sundry civil appropriation act of August 7, 1882, for an appropriation—

"For repairs and preservation of public buildings: For repairs and preservation of custom-houses, court-houses, and post-offices, and other public buildings under control of the Treasury Department, one hundred and forty thousand dollars. And any disbursing agent who has been or may be appointed to disburse any appropriation for any United States court-house and post-office, or other building or grounds, not located within the city of Washington, shall be entitled to the compensation allowed by law to collectors of customs for such amounts as have been or may be disbursed."

This provision will apply to the appropriations made previously, as well as those in this act. (*Minis v. United States*, 15 Pet. 445.)

It was intended to secure compensation to the postmasters at Philadelphia and New York for disbursements by them respectively made, and for disbursements made by Mr. Bingham, who when a private citizen was appointed to make disbursements at Philadelphia. It recognizes the right to compensation, and thus a power to disburse this year's appropriations. A power recognized is a power granted. (*State v. Miller*, 23 Wis. 634; *Pierce's Case*, 1 C. Cl., 220; *Floyd Acceptances*, 7 Wall., 666; 15 Op., 322.)

\$18.33 as fees, and \$146.57 for traveling expenses. These charges are made under the following provisions of the Revised Statutes:

“For serving venires and summoning every twelve men as grand or petit jurors, four dollars, or thirty-three and one-third cents each. In States where, by the laws thereof, jurors are drawn by lot, by constables, or other officers of corporate places, the marshal shall receive, for each jury, two dollars for the use of the officers employed in drawing and summoning the jurors and returning each venire, and two dollars for his own services in distributing the venires. But the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service, shall not at any court exceed fifty dollars.”

The last paragraph of section 829, referring to mileage generally upon all kinds of process, provides that—

“In all cases where mileage is allowed to the marshal he may elect to receive the same or his actual traveling expenses, to be proved on his oath, to the satisfaction of the court.”

In the adjustment of marshals' accounts it is held that the limitation of \$50 applies to the fees and mileage for summoning the jurors required at any court, whether the jurors are summoned directly by the marshal, or by officers of corporate places.

The question is submitted, whether this limitation applies also when a marshal elects to receive “actual traveling expenses” in lieu of mileage, and charges the fees prescribed for “serving venires and summoning” jurors at any court.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

Prior to the year 1876 it was held by the accounting officers, that, as the amount payable to a marshal for fees and mileage for summoning jurors at any court was limited to \$50, the sum payable to him for serving venires and actual traveling expenses in lieu of mileage at any court was also thus limited. But in said year, upon the urgent solicitation of the United States marshal for Utah, the Comptroller reconsidered the question, and finally decided that the limitation did not apply in the latter case. The immediate successor of the said Comptroller acquiesced in the decision, but inclined to the opinion that, if the question was *res integer*, it would be otherwise held. Decisions once made, after long usage, should generally be adhered to, unless clearly wrong.

The question now submitted is open for decision as to accounts not yet settled.

The marshal is entitled to the fees, as charged (\$18.33), for “serving venires and summoning” the jurors. This expression, “serving venires and summoning” jurors, simply means (in districts where township officers are not used for the purpose) serving the writs upon, and thus summoning, the jurors.

He is also entitled to the sum charged for “actual traveling expenses” in lieu of mileage. (14 Ops., 681, 683.) This conclusion is sup-

ported by several considerations. The language of the statute is sufficiently clear to require it. When this is true, it is the proper guide. *Index animi sermo. Maledicta expositio quæ corrumpit textum. A verbis legis non est recedendum.* In clear terms the limitation of \$50 applies only to "the fees for distributing and serving venires, drawing and summoning jurors by township officers, including the mileage chargeable by the marshal for each service * * * at any court." The last paragraph of the statute cited expressly gives a right to payment of "actual traveling expenses," without limitation as to amount, "in all cases where mileage is allowed," that is, where it is allowable. The expression "all cases" is almost as comprehensive as language can make it. It is true that "general words may be aptly restrained according to the subject-matter or persons to which they relate." (Broom, Leg. Max., 646.) But this can only be when the purpose so to restrain them appears in the statute, in some of the statutes relating to the subject, from the history of legislation relating thereto, the conditions which induced it, or other public evidence thereof. Nothing of this character appears here. On the contrary, the purpose of Congress was to provide that, in large, sparsely settled districts, with inconvenient or expensive modes of travel, when the mileage prescribed by statute would not pay "actual traveling expenses," the marshal should not suffer actual loss; and hence, though he must travel without compensation, yet that he should be reimbursed his actual expenses. This purpose would be defeated by applying the limitation of \$50 in such a case as this. The manifest equity of the statute, if it may be considered at all, corroborates this view. It is not necessary to invoke the rule of construction sometimes applied, that well-founded doubts arising on a statute prescribing official compensation are to be resolved in favor of the officer.

The limitation to \$50, contained in the third paragraph of section 829 of the Revised Statutes, is the re-enactment in a modified form of a proviso in section 1, act of February 28, 1799. (1 Stats., 624.) When originally enacted, and when re-enacted in the year 1853, marshals were not confined to actual travel in their mileage charges, as they are now (act February 22, 1875, 18 Stats., 334; Subpœna Case, 2 Lawrence, Compt. Dec., 286); and, as jurors can often be summoned without much actual travel, the limitation was probably intended to prevent unreasonable charges for constructive travel. This gives a reason for the limitation of charges for mileage, but the reason does not apply to a claim for a reimbursement of actual expenses.

When a jury is required in a United States court, within a State where, by the laws thereof, jurors are drawn and summoned by township officers, the clerk of such court issues to the marshal venires for the number of jurors required from each town. The venires are distributed by the marshal to the officers of the towns, whose duties it is to summon jurors, and they serve the writs by drawing and summoning the number required. This was the practice when the act of February 26, 1853

(now section 829, Rev. Stats.), was approved, and it is still in vogue in some of the States. In the northern district of Florida the marshal, or his deputies, summon the jurors without the intervention of other officers.

The marshal for the southern district of Florida has recently raised a question, whether the laws limiting fees and mileage for summoning jurors applied to districts where jurors are not summoned by township officers. At the time the law was enacted, February 26, 1853, it was construed to apply to all districts without regard to the manner in which jurors were summoned, and it was merely a re-enactment of the following provision in an act approved February 28, 1799, allowing fees to marshals:

“For summoning each grand and other jury, four dollars: *Provided*, that in no case shall the fees for summoning jurors to any one court exceed fifty dollars; and in those states where jurors, by the laws of the state, are drawn by constables, or other officers of corporate towns or places, by lot, the marshal shall receive for the use of the officers employed in summoning the jurors and returning the venire, the sum of two dollars, and for his own trouble in distributing the venire, the sum of two dollars.”

No reason can be seen why there should be a limitation in one district and not in another; and, as it does not clearly appear that the law was intended for some but not for all, a new construction on this point will not be adopted.

The marshal is allowed credit for the sum claimed.

TREASURY DEPARTMENT,

First Comptroller's Office, May 1, 1882.

IN THE MATTER OF REPLACING MUTILATED UNITED STATES NOTES (GREENBACKS), UNDER SECTION 3580 OF THE REVISED STATUTES, IN FAVOR OF FINDERS THEREOF.—LOST GREENBACK CASE.

1. The finder of a mutilated lost United States note is not entitled to have it replaced under section 3580 of the Revised Statutes. The rightful owner only has such a right.
2. A State statute, applicable as between citizens subject to its jurisdiction, which would make possession for a proper length of time evidence of ownership, would be regarded by officers charged with the duty of replacing or redeeming United States notes.
3. Such notes when presented to the Treasurer for replacement should not be returned to a finder presenting them, but should be kept subject to the control of Congress.

May 4, 1882, L. G. Karst, of Morgan County, Indiana, made affidavit that he found a mutilated five-dollar United States note, commonly called a “greenback,” which he transmitted to the Treasurer of the United States for redemption, who, on the 9th of May, referred the affidavit to the First Comptroller for his opinion whether payment could be made.

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The note in question was issued under act of Congress of February 25, 1862 (Rev. Stats., 3571). It is a promissory note of the United States, in which it is said, "The United States will pay to bearer five dollars." The statute authorizing replacement of mutilated United States notes provides, that "when any United States notes returned to the Treasury are so mutilated or otherwise injured as to be unfit for use, the Secretary of the Treasury is authorized to replace the same with others of the same character and amounts" (Rev. Stats., 3580). This note is of the character indicated in this section, and under the "regulations" is payable in full.* The application is made under this section. Appli-

* The regulations of the Treasurer on this subject of March 6, 1882, approved by the Secretary of the Treasury, are as follows:

VI.—Redemption of United States notes, silver certificates, and fractional currency.

11. United States notes, each equaling or exceeding three-fifths of its original proportions, in one piece, are redeemable at their full face value in other United States notes by the Treasurer and the several assistant treasurers of the United States, and are redeemable in coin, in sums not less than \$50, by the assistant treasurer in New York.

12. Fractional notes, each equaling or exceeding three-fifths of its original proportions, in one piece, are redeemable at their full face value in United States notes, in sums not less than \$3, by the Treasurer and the several assistant treasurers of the United States.

13. Silver certificates, each equaling or exceeding three-fifths of its original proportions, in one piece, are redeemable at their full face value in standard silver dollars by the Treasurer and the several assistant treasurers of the United States.

14. United States notes and fractional notes, of which less than three-fifths of each note remains, are redeemable only by the Treasurer of the United States.

15. Silver certificates, of each of which less than three-fifths remains, are redeemable only in standard silver dollars, and only by the Treasurer of the United States.

16. Fragments of United States notes, silver certificates, and fractional notes, each constituting clearly one-half, but less than three-fifths, are redeemable at one-half the full face value of whole notes or certificates.

17. Fragments less than half are redeemed only when accompanied by an affidavit executed in accordance with the requirements of the following paragraph.

18. Notes and certificates, of which less than three-fifths of each note or certificate remains, accompanied by an affidavit from the owner or from such other persons as have knowledge of the facts, that the missing portions have been totally destroyed, are, if the proof furnished is satisfactory, redeemed at their full face value. The affidavit must state the cause and manner of the mutilation, and must be sworn and subscribed before an officer qualified to administer oaths, who must affix his official seal thereto, and the character of the affiants must be certified to be good by such officer or some other having an official seal. The Treasurer will exercise such a discretion under this regulation as may seem to him needful to protect the United States from fraud.

19. Fragments not redeemable are rejected and returned; counterfeit notes are branded and returned.

The regulations under section 5184, &c., of the Revised Statutes, as to national bank notes, are as follows:

20. National-bank notes are redeemable by the Treasurer of the United States in sums of \$1,000, or any multiple thereof.

21. Notes equaling or exceeding three-fifths of their original proportions, and bearing the name of the bank and the signature of one of its officers, are redeemable at their full face value.

22. Notes of which less than three-fifths remain, or from which both signatures are lacking, are not redeemed by the Treasurer, but should be presented for redemption to the bank of issue. If redeemed by the bank for face value, they are accepted at that value by the Treasurer only when accompanied by evidence, as required by paragraph 18, that the missing portions have been entirely destroyed.

23. Fragments redeemed by the bank of issue for less than face value are accepted by the Treasurer only when their valuation is equal to the face value of a note of some denomination issued by the bank, or some multiple thereof, and are delivered to the

cation for payment in coin might also be made at the office of the assistant treasurer in New York, under the resumption act of January 14, 1875 (18 Stats., 296).

The question now presented is, whether the claimant, as finder, is entitled to have the mutilated note replaced with a new or un mutilated one, and is not what would be the right of the finder of tangible personalty. (1 Blackst. Com., 296; 2 Kent Com., 356; Sallu's Case, 1 Lawrence, Compt. Dec., 239; Bridges *v.* Hawkesworth, 7 Eng. L. & Eq., 424; Matthews *v.* Harsell, 1 E. D. Smith, N. Y., 393).

If the State of Indiana had a statute applicable as between citizens of that State, which made possession for a proper period of time by the finder of United States notes evidence of ownership, it might be regarded by the proper officers of the United States in redeeming them. (Sallu's Case, 1 Lawrence, Comptroller's Decisions, 236.) Every State has a right to enact a statute of limitations. Such statute can not operate upon persons or property not subject to its jurisdiction; and, as the domicile of the owner of a United States note is its situs (Foreign-held Bond Case, 15 Wall., 300; Kirtland *v.* Hotchkiss, 100 U. S., 499; Worthington *v.* Sebastian, 25 Ohio St., 7, 10), a State statute cannot operate on the right of an owner having a domicile elsewhere. Such statute can have no extraterritorial operation. (Sallu's Case, 1 Lawrence, Comptroller's Decisions, 238.) But there is no such statute in Indiana. In Massachusetts the finder of lost money or goods is required by statute to give notice as prescribed, and, if no owner appears, one-half goes to the finder, and the other half to the proper town. (Acts 1788, ch. 55; Rev. Stats., 1836, p. 395; see Ill. Stats. of 1833; Stats. of 1858, p. 753; Rev. Stats. Wis., 1849, ch. 36).

If the owner of tangible chattels throws them away for the purpose of abandoning all right thereto, a finder may at common law claim them. (2 Kent, 356; 1 Blackst., 296; 2 Id., 402). The owner of a bank note who throws it away for the purpose of abandoning all claim thereto, surrenders his claim, or right of action thereon, but does not invest it in a finder. There is a wide difference between tangibilities and a right of action. The former is property; the latter is a chose in action. If a right of action be abandoned, the debtor is relieved of payment, but no other party is thereby invested with the abandoned right. If a plaintiff in an action *ex delicto*, or on a verbal promise to pay or acknowledgment of indebtedness, decline to prosecute his action, or expressly abandon his right of

Comptroller of the Currency as notes of such denomination. The required valuation may be made up of several fragments of notes of the same or different denominations. Fragments not clearly more than two-fifths are accepted only when accompanied by evidence, as required by paragraph 18, that the missing portions have been entirely destroyed.

24. It having been decided that national bank notes, stolen when unsigned, and put in circulation with forged signatures, are not obligatory promissory notes of the banks under section 5182 of the Revised Statutes; they are not redeemed by the Treasurer.

25. Notes of national banks that have failed, or gone into voluntary liquidation, are redeemed in the same manner and on the same terms as United States notes.

action, this does not thereby invest the right in any other person. The finder of a paper evidence of a right of action even, abandoned by the owner, cannot acquire thereby the right of action, because the paper found is not the right, but only the evidence of it. This must be so, because the right exists, even after the loss of the paper evidencing it. On common-law principles the finder of a bank note, or United States note, acquires no right thereto. Such notes are mere promises, and the promise is never lost, nor can the right to compel the performance of the promise be lost or found. The paper evidence of the right may be lost or found, but in either event the right itself remains. If a bank note be destroyed while in the possession of its owner, he may by action in court enforce the promise of payment as upon a lost note. (2 Daniel Neg. Instruments, 1694; *Tower v. Appleton Bank*, 3 Allen, 387; *Wade v. N. O. Canal and Banking Co.*, 8 Rob. La., 142; *Bank of Mobile v. Meagher & Co.*, 33 Ala., 622; *Carey v. Greene*, 7 Ga., 79; *Morrell's Case*, 7 Court Cl., 422; *Morse on Banking*, 410; *Sallu's Case*, 1 Lawrence, Compt. Dec., 240; *McLaughlin v. Waite*, 5 Wend., 404; see *Regina v. Mole*, 1 Carr & Kirw., 417; *Merry v. Green*, 7 Mers. & Welsb., 623; *Regina v. Peters*, 1 Carr & Kirw., 245).

Trover will lie against the finder of bank notes by the owner. (2 Daniel Neg. Instruments, 1687; 2 Parsons Notes & B., 93, n.; *Mason v. Waite*, 17 Mass., 560.)

There is no ground upon which the claimant is entitled to any relief. He is not even entitled to the return of the note. This has been in principle heretofore decided. (*Sallu's Case*, 1 Lawrence, Compt. Dec., 214.)

As the note in question came to the Treasurer in his official character, it should be held by him in the same capacity; and, as a matter of prudence, an account should be kept of this and similar matters, subject to the control of Congress. It cannot now be covered into the Treasury, because there is no appropriation out of which any rightful owner could be paid who might appear and be entitled to have it redeemed in his favor. If such owner should appear, he would be entitled to payment. After a period of twenty years, if not after seven, the law would presume that no claimant would appear, and it should be covered into the Treasury.

The Treasurer will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, May 12, 1882.

IN THE MATTER OF A HUSBAND'S CLAIM TO HAVE TRANSFERRED TO HIMSELF, BONDS OF THE UNITED STATES PURCHASED, IN PART, WITH HIS WIFE'S MEANS, AFTER MARRIAGE, AND INSCRIBED IN HER NAME WITH HIS ASSENT.—DE BILDT'S CASE.

1. By the laws of Sweden a husband has a right to reduce to possession, as his own, the bonds owned by his wife at the time of marriage, or thereafter acquired, unless his right is waived by a marriage contract.
2. When a female citizen of the United States marries an alien, having a domicile on the continent of Europe, her domicile generally becomes the same as his; in other words, by marriage, the wife's domicile is generally merged in that of her husband.
3. When a matrimonial contract is entered into at a place other than in the country or state of the husband's domicile, the *lex loci domicilii*, not the *lex loci contractus*, determines the husband's rights in respect of the personal estate of the wife.
4. In such case, in the absence of a nuptial contract, the laws of the place of the husband's domicile generally determine his right to government bonds of the wife, owned at the time of marriage, or thereafter acquired, unless such right is waived by valid contract.
5. The right to a transfer of government bonds arising by operation of law at the owner's domicile is recognized as valid, when not in conflict with an act of Congress or public policy.
6. The law applicable to negotiable securities issued by corporations and private persons is generally applicable to negotiable public securities of the United States.
7. The laws of the United States in force at the place where such public securities are issued and payable—the Treasury Department at Washington—generally governs their construction, obligation, and validity.
8. Upon the same principle, the construction, obligation, and validity of a post-nuptial contract in relation to such bonds is governed by the laws of the place where it is made.
9. No matter what may be the laws of the place of domicile of aliens, a post-nuptial contract made and executed by an alien husband and wife in the District of Columbia, or generally in the United States, by which government bonds are purchased, in whole or in part, with the wife's means and registered in her name is valid; and the husband cannot assert any marital rights to have such bonds transferred to himself, as his property, as he could, at common law, bonds owned by the wife at the time of marriage, or acquired afterwards by succession, gift, bequest, or distribution. There are several sufficient reasons for this: (1.) The rights of the wife in such case are different from those existing at common law, in this, that by the common law she cannot assign negotiable securities without the assent of the husband, yet in this case she can alone assign government bonds registered in her name, and interest checks payable to her order. (2.) The American law generally recognizes the right of a husband to waive his marital rights, and such post-nuptial contract is valid as such waiver. (3.) When the United States has assented to such post-nuptial contract and issued bonds in the wife's name, the husband is estopped from denying the validity of such waiver. (4.) Such contract is valid as a settlement of property to the separate use of the wife. (5.) The general rule, that the marital rights of the husband in the wife's personal property are determined by the law of his domicile, is subject to the exception that his rights in relation thereto arising under contracts made by, or with his assent affecting such property, are to be determined by the laws of the place where the contract is made.
10. The acts of Congress under which government bonds are issued are paramount to all other law. Hence, rights fixed by these are not controlled by any other law.

11. The general rule in the courts is, that a foreign guardian, committee, executor, or administrator cannot exercise any authority in the United States over tangible property or ordinary claims, unless authorized by statute.
12. But it is a rule in the Treasury Department, settled by long usage, and the decisions of the accounting officers, that payment of negotiable public securities may be made to a foreign guardian. This rule is also recognized by the common law.
13. There is a common law of the executive departments resulting from usage, as well as of the judiciary.
14. The record of the appointment of a foreign guardian, committee, or trustee of an insane person, must show an adjudication of such person's insanity, and the appointment of such guardian, committee, or trustee by a competent judicial tribunal in a proceeding to which the insane person was a party.
15. On the application of the husband of an insane wife, a guardian, committee, or trustee may sometimes be appointed in the District of Columbia, notwithstanding the husband and wife are aliens having a domicile abroad, and especially when there is no foreign appointment.
16. Payment of bonds of the United States may be made to foreign executors or administrators having possession of such bonds, especially when there is no administration taken out in the United States.

On the 30th of September, 1874, Mr. C. N. de Bildt, a Swedish subject, having his domicile in Sweden, was married at Paris, France, to Lilian Augusta Stuart Moore, a citizen of the United States, previously domiciled in Philadelphia, Pa.

January 7, 1879, the parties being at Washington City, D. C., four per cent. registered bonds of the United States, numbered 31236, 31237, 31238 and 31239, for \$1,000 each, and issued under act of Congress of July 14, 1870, were, with the assent of the husband, issued and inscribed in the name of his wife.

Mr. de Bildt became secretary of legation of the Swedish and Norwegian embassy in the United States; and, while he and Madame de Bildt were, in consequence thereof, temporarily residing in the United States, she became insane, about May 4, 1881, and is now traveling in Europe for her health. She has not been adjudged insane by any tribunal. By virtue of his marital rights, application was made to the Secretary of the Treasury by Mr. de Bildt to cause the bonds to be transferred to him and inscribed in his name, as his property. Mr. de Bildt asks also for payment upon his indorsement of sundry interest checks, issued (Rev. Stats., 3593, 3644, 3688), payable to the order of Lilian de Bildt, in payment of interest on said bonds, being 13 checks of \$40 each, for quarter-yearly interest, amounting in all to \$520.

It is shown that the mother of Madame de Bildt gave to her daughter and her husband after their marriage, "to be their common property", the money with which the bonds were bought, and that "no marriage contract * * * has been registered" in the proper court at Stockholm between Mr. de Bildt and wife.

The law of Sweden is thus certified :

"At the request of Mr. C. N. D. Bildt, chamberlain, secretary of legation, &c., I hereby certify:

"1st. That when no marriage contract has been made between hus-

band and wife, or no special prescriptions otherwise made as to any particular property, the husband is by the law of Sweden, empowered, as the guardian of the wife, to administer and dispose of not only the property belonging to the conjoints in common, but also the private property of the wife, and this without any other limitation, than that the husband may not without the consent of his wife sell or hypothecate the wife's private real estate; and in consequence, as concerns certificates of indebtedness or bonds belonging to the wife, the husband has the right, without needing to be specially commissioned or empowered for such purpose, to sell such papers, to receive the interest thereon and to give quittance and receipt for any monies derived from such source; and,

"2d. That the fact that deeds, certificates of indebtedness, bonds or any such papers are made out to the wife, is not, according to the law of Sweden, alone and by itself evidence that the property represented by such papers belongs to the wife privately or is excepted from the administration of the husband.

"C. LEYONHUPUD,
" *Chancellor of Justice of the Realm.*

"STOCKHOLM, *July 16, 1881.*

" *To the Minister for the Foreign Affairs :*

"In reply to your excellency's letter of the 19th instant, accompanied by the inclosed application of Mr. C. Bildt, secretary of legation, dated on the 30th of November next preceding, I beg first to remind that the custom existing in some foreign countries, as for instance, America and elsewhere, of registered bonds, that is to say, such obligations, one of whose essential features is, and to the due creation and validity of which, it is absolutely requisite, that they under certain strictly determinate forms shall for a certain named individual be entered into public memorial books made up for this special purpose, or as so called registers, has not been introduced into this country and that accordingly no special legislation as to such bonds has taken place here, as the case is in some other countries, in consequence of which such judicial questions as may arise here with regard to such bonds must be judged according to the same law and the same principles that are adaptable for another personal property, as, for instance, claims based on notes of hand &c.

"Having premised the above observations, I now further, at the request of the secretary of legation, Mr. Bildt, proceed to certify :

"1st. That according to Sweedish law, the circumstance that a married woman has fallen into insanity does not by itself affect or alter the judicial relation between her and her husband, and that the husband's guardianship over the wife thus continues unaltered after and during her insanity, and:

"2d. That this guardianship, (where it has not been retrenched by any convention or otherwise for certain events no special prescriptions are given) comprises the right for the husband to sell personal property belonging to the wife and accordingly also bonds registered in her name, in which transaction it is an indifferent matter in view of the law whether the sale is effected in the husband's own name, or with referring to his guardianship.

"Whereas, according to what has been stated above, no special legislation with regard to registered bonds exists in this country, nor any special prescription as to the husband's guardianship over his wife when insane has been issued, there is no other law adaptable to this case than the 1st paragraph of the 9th chapter of the matrimonial code, which in

connection with the addition thereto caused by the Royal Enactment of the 11th December, 1874, runs as follows: 'When man and wife have been married to each other, then he is her true guardian and representative in all matters to sue and act for her except with regard to property that has been withdrawn from his management; the wife will also share the social station and condition of her husband.'

"If by a matrimonial convention it has been stipulated that property belonging to the wife shall be distracted from the management of the husband, or if such a prescription has been given with regard to property devolved upon the wife by gift or will on condition that such property shall be her private one, then the wife is alone mistress over such property and its revenues. if not otherwise has been stipulated as to the management. What the wife is able to gain by her own work, of that she shall also be alone possessed.

"Stockholm, the 28th December, 1881.

"C. LEYONHUPUD."

—

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The right of the claimant to indorse and collect the interest checks in question depends upon the same principles of law applicable to his claim to have a transfer made to himself of the bonds. This right is to be determined either by the laws (1) of the place of marriage, or (2) of the place of domicile of the parties, or (3) of the place where the bonds and interest checks were issued and payable, or (4) by the circumstances under which, and considerations upon which, they were issued. The nationality of the parties and the insanity of one of them are elements to be considered.

I. The nationality of the wife is not shown by the transcript of the Swedish law.

In the absence of a statute, an alien woman was not made a citizen of the United States by her marriage with a citizen thereof. (*Shanks vs. Dupont*, 3 Pet., 246; Rev. Stats., 1994). And an American woman does not lose her citizenship by marriage with an alien. Generally, where the English common law does not prevail "the nationality of a woman on marriage merges in that of the husband." (Nationality, by Cockburn, London, 1869, 24; Wharton, *Conf. L.*, 43, 45; Morse on Citizenship, 29, 102, 105, 135, 136; Phillimore, *Int. Law*, 350.) Sometimes a double nationality has been recognized, but this may now, perhaps, be regarded as impossible. (Morse on Citizenship, 38, 76, 129.) Whatever the nationality of the wife in this case may be, her rights are not affected thereby; but by other considerations—domicile and contract. (Wharton, *Conf. L.*, 88, 95, 119.) There may be domicile without nationality. (Wharton, *Conf. L.*, 40.)

II. It was at one time declared by Judge Story, "that in the case of a marriage where there is no special nuptial contract, and there has been no change of domicile, the law of the place of celebration of the marriage ought to govern the rights of the parties in respect to all personal or movable property, wherever that is acquired, and wherever it may

be situate." (Story, Conf. L., 159, 187.) But this is not now regarded as law. (Wharton, Conf. L., 191, 192; Story, Conf. L., Redfield's ed., 171 b; Warrender v. Warrender, 2 Cl. & Finn., 488; s. c., 9 Bligh, 89. 127; Saul v. His creditors, 7 Martin, La., 599.)

III. It is material to ascertain the domicile of the wife, in this case, before considering the laws thereof. Wharton says, "English and American courts are * * * explicit in declaring that, on marriage, the wife's domicile merges in that of the husband." (Wharton, Conf. L., 43, 189, 190; 2 Parsons Cont., 6th ed., 581, 600; Pennsylvania v. Ravenel, 21 How., 103.) The domicile of the wife, then, is to be regarded as in Sweden.

IV. The marital rights of the husband in and to the personal estate of the wife, including intangibilities such as government bonds, whether owned by the wife at the time of marriage, or thereafter acquired by her, are generally determined by the law of his domicile, in the absence of any valid contract to the contrary, or in the absence of other controlling facts. (Westlake, Priv. Int. Law, 361, 366; Wharton, Conf. L., 190, 199; Story, Conf. L., 185, 193; Goodman v. Niblack, 102 U. S., 556; Draft case, 1 Lawrence, Compt. Dec., 23; Sallu's Case, *Id.*, 225, 235, 237; 3 American Law Register, N. S., 193; Este v. Smyth, 18 Beavan, 112.) If by the law of the husband's domicile he is invested with the right to reduce to his possession, as his own, the government bonds owned by his wife at the time of marriage, or which may thereafter come to her by succession, devise, distribution, or gift, his right to transfer the same also arises by operation of law. This is the rule as to notes, bills, and other choses in action. And when the United States lawfully becomes a party to negotiable securities, including registered government bonds, it generally occupies the same position as a corporation, or private person, who is a party to similar instruments, and the same law is applicable, subject to qualifications imposed by statute, or general principles of public policy. (United States v. Bank of the Metropolis, 15 Pet., 377; 2 Op. Att. Gen., 504; 4 *Id.*, 90; *Id.*, 295; 8 *Id.*, 1; United States v. Barker, 12 Wheat., 559; The Floyd Acceptances, 7 Wall., 666; Vermilye & Co. v. Adams Express Co., 21 Wall., 138.) Hence, a registered bond of the United States, payable by its terms to a designated person, "or assigns," is generally payable to such person as, by assignment, or by operation of law, becomes an assignee, or owner of the same. (Vaughn v. Northup, 15 Pet., 6; Armstrong v. Lear, 8 Pet., 53; Carpenter v. Commonwealth of Pennsylvania, 17 How., 456; Harrison v. Nixon, 9 Pet., 483; Erwin v. United States, 97 U. S., 397; Goodman v. Niblack, 102 U. S., 560; Claims-Assignment Case, *ante*, 13.

V. The laws of the United States in force at the place where the bonds and checks were issued and payable—the Treasury Department at Washington—govern their construction, obligation, and validity. (Story, Conf. L., 240, 241; Wharton, Conf. L., 401; 2 Parsons Cont., 6th ed., 571; Bank of the the United States v. Donnelly, 8 Peters, 372;

Scudder v. Union National Bank, 91 U. S., 406.) And, upon the same principle, the construction, obligation, and validity of a post-nuptial contract, express or implied, in relation to such bonds, even by husband and wife having a nationality and domicile in Sweden, are to be determined by the laws of the place where such contract was made.

It is shown that the laws of Sweden recognize ante-nuptial contracts as to property, but the effect of post-nuptial contracts is not shown; nor is it material. If, by the laws of Sweden, a married woman having a domicile there, could not there make a valid contract with her husband, or become payee in a government bond, so as to exclude him from his marital right to claim the ownership of such bond, yet such incapacity does not attach to her here, when such contract is made or bond issued, in the United States, unless the "*lex loci contractus aut actus*" requires. The rule on this subject has been thus stated: "In regard to questions of * * * incapacities incident to coverture, * * * the law of the domicile * * * is not generally to govern, but the *lex loci contractus aut actus*, the law of the place where the contract is made or the act done." (Story, Conf. L., 103, 54, 66a, 100, 241; Scudder v. Union National Bank, 91 U. S., 412.)

The purchase of the bonds in this case, in fact, involved no question of the capacity of a wife to contract with her husband or of the effect of such contract on his rights, but only the right of a wife to be the payee of bonds, or, with the assent of her husband, to be a party to a contract with the United States. The general rule of international law already stated recognizes the validity of such contract. And, if this were not so, such contract is sanctioned by the acts of Congress authorizing loans, its legal validity is recognized by long usage, and is supported by public utility, if not necessity, by public policy, and by the generally-recognized sentiment of the American bench and bar. It would seem, therefore, that executive officers here would recognize the competency of the wife to make such post-nuptial contract as that made in this case, whether made here or elsewhere. (Story, Conf. L., 558; Andrews v. Pond, 13 Pet., 65.) But the question of capacity may be distinct from that of the *marital right to property* arising under this contract.

VI. Is the right of the husband under such contract to be determined by the laws of Sweden or of the United States?

If such post-nuptial contract, or assent, would not, by the laws of Sweden, take from the husband his right to reduce the bonds to possession, as his, will it do so here?

It may be assumed, that the domicile of the parties, whose rights are being considered, is Sweden; that by the laws of Sweden the husband in this case has a right to have transferred to himself the registered government bonds of the wife owned by her at the time of marriage, or which she thereafter acquired without his agency; and that he has a right to indorse and collect interest checks issued to her on all such bonds; and even that a post-nuptial contract could not be made in

Sweden to divest the husband of his right in these bonds. But it does not follow that he has a right to the bonds or interest checks in question. The bonds were purchased with means obtained from the wife's mother, were inscribed in her name without objection by the husband, and in the absence of evidence on the subject, it would be presumed with his assent; and in this case it is affirmatively shown that it was at his request. By reason of all this a contract was made, by which the United States agreed to pay interest on the bonds, and finally the principal to the wife or her assigns. This contract was made in the United States—at the Treasury Department—and is there to be performed.

Upon well-settled principles its *construction*, *obligation*, and *validity* are to be determined by the acts of Congress authorizing the bonds, the usages of the Treasury Department, and general principles of public policy, which, no less than the general rule of international law, make the contract valid in favor of the wife. The law of the domicile does not control.

1. The common-law rule is, that a married woman cannot assign negotiable securities, such as bonds of the United States, or interest checks. (1 Daniel, Neg. Insts., 242; 1 Bishop, Married Women, 39, 100 note, 165.) But this rule does not apply to government bonds issued to a married woman. So long as the husband does not assert his marital right to reduce them to his possession, and cause them to be transferred in his name, the wife, as payee, may assign such bonds, and may indorse and collect interest checks. This is the effect of the terms of the contract made in pursuance of the several acts of Congress authorizing public loans.

The bonds in this case were issued under the act of July 14, 1870, which authorized them "in such form" as the Secretary of the Treasury might "prescribe." (16 Stats., 272.) The form of the registered bonds is to pay the payee named, "or assigns." Hence, by the very terms of the contract, the payee may assign.

This form, prescribed by regulations in pursuance of an act of Congress, constitutes a contract authorized by a law higher than any other law. (Sallu's case, 1 Lawrence, Compt. Dec., 228.) The authorized "regulations" of the Treasury Department on the subject, which have the force of law, declare that registered bonds "are payable only to such payees [therein named] or their assigns, and the property or ownership in them can be transferred only by assignment." (*Id.*, 230.)

The long-continued, uninterrupted usage of the Treasury Department has become law. It has never been the practice to require the husband of a married woman to unite with her, in assigning bonds inscribed in her name either before or after her marriage, or in indorsing interest checks. The marital rights of the husband are only considered *when* duly asserted by him.

2. Inasmuch as the wife has a capacity given her by authority of Congress to assign bonds and indorse and collect interest checks, it

rationally follows that the husband may waive his marital rights over her property in them. (Nolen's appeal, 11 Harris, Pa., 37; Hind's Estate, 5 Whart. Pa., 138.) He must, if necessary, be deemed to have waived all rights under Swedish law. The application of a particular local law is the consent of the parties. (Wharton, Confl. L., 397; Bethmann-Holweg's Essays, *Versuche*, 1-77.) It would be a legal fraud for the husband to assent to such contract, and then insist that it should not have effect. No court would aid such a claim. The husband waived all his marital rights by permitting the bonds to be inscribed in his wife's name. By his sanction a contract was made in the issue of the bonds, by which the United States agreed to pay the wife. This contract is one entirely valid, if not at law, at least in equity; and in such case as this executive officers deal with the real ultimate rights of the parties, especially when the party beneficially interested is vested with the legal title. The husband having assented to the contract, there is no principle upon which his assent can be withdrawn at his pleasure. A contract once made can, as a general rule, only be terminated by the consent of all the parties thereto, except when rescinded in certain cases of default in complying with its conditions.

3. When a husband acquiesces in the issue of a registered government bond to his wife, a promise is made in her favor, the validity of which he is estopped from disputing. (Herman, Estoppel, 504; Wallace *v.* Bassett, 41 Barb., 92; Maher *v.* Hobbs, 2 Y. & C. Exch. Cases, 317; England *v.* Downs, 2 Beav., 535; Ashton *v.* McDougall, 5 Beav., 66; Graybrook *v.* Percival, 14 Tur., 1103; Loder *v.* Clarke, 2 Mac. & Y., 382.)

This contract follows the bonds wherever they may be. (DeLane *v.* Moore, 14 How., 253; Bank of the United States *v.* Lee, 13 Pet., 107; Duncan *v.* Cannon, 23 Eng. Law & Eq., 288, 18 Beav., 128; LeBreton *v.* Nonchet, 3 Martin La., 73; Young *v.* Templeton, 4 La. Ann., 254; LeBreton *v.* Miles, 8 Paige, 261.)

4. The validity of an ante-nuptial contract is recognized by the laws of Sweden, as it is generally in all countries. (Schouler's Domestic Rel., 262; 2 Kent Com., 163; Magniac *v.* Thompson, 7 Pet., 348; Neves *v.* Scott, 9 How., 196; s. c., 13 How., 268.)

Post-nuptial contracts, by which the husband surrenders his right to the wife's property, are generally valid when made in the United States. The wife's capacity to be a payee in a promissory note is recognized even at common law.

Thus it was said by Dewey, J., that—

“The doctrine that a feme covert has no civil capacity, must be taken with many qualifications; and although she cannot during coverture act separately from her husband, yet with his consent she may become a party as grantee to a deed, or obligee to a bond, or payee to a promissory note; and when thus made a party, new rights may be acquired by her. This may be effected by a contract made [by a third person] jointly with the husband and wife, or it may be by a contract with her alone; and in either case, upon the survivorship of the wife, these interests, although

accruing during coverture, will vest in her." (Phelps *vs.* Phelps, 20 Pick., 559; 1 Bishop, Married Women, 714, 103-107, 171; Winslow *vs.* Crocker, 17 Maine, 29; Scott *vs.* Simes, 10 Bosw., 314; Bassett *vs.* Bassett, 10 N. H., 64; Stanwood *vs.* Stanwood, 17 Mass., 57; Draper *vs.* Jackson, 16 Mass., 480; Schouler's Domestic Relations, 276.)

In case of a mere voluntary gift from husband to wife, it may be at common law that in private transactions the husband can still exercise his marital rights over the property so given. (1 Bishop, Married Women, 720, 722.) But when such gift is made in consideration of the wife's surrender of her property, equity will protect her interests, and restrain the husband from reducing it to his possession in violation of the agreement, as it is for a valuable consideration. (1 Bishop, Married Women, 103, 107, 239, 348, 714, 720, 722; Searing *v.* Searing, 9 Paige, 283; Garlick *v.* Strong, 3 Paige, 440; Caldwell *v.* Bower, 17 Missouri, 564; Needham *v.* Sanger, 17 Pick., 500; Booger *v.* Addison, 2 Rich., Eq., 273; Jordan *v.* Hubbard, 26 Alab., 433; Bullard *v.* Briggs, 7 Pick., 533; Schouler's Domestic Relations, 281; 4 Kent Com., 463; Wheeler *v.* Caryll, Amb., 121; Simmons *v.* McElwain, 26 Barb., 420; Ready *v.* Bragg, 1 Head, 511; Unger *v.* Price, 9 Md., 552; Hale *v.* Plummer, 6 Ind., 121; Andrews *v.* Andrews, 28 Alab., 432; High on Injunctions, 839; Green *v.* Green, 5 Hare, 399, note *b*; Johnson *v.* Vail, 1 McCart., 423.)

A husband may make a voluntary settlement in favor of the wife, and it will be protected except as against his creditors. (Bishop, Married Women, 726; Wickes *v.* Clarke, 3 Edw. Ch., 58; Smethurst *v.* Thurston, Brightly, 127; Ashe *v.* Lowe, Hayes & J., 287; Andrews *v.* Andrews, 28 Alabama, 432.)

5. The general rule is, that the marital rights of the husband in the wife's property are to be determined by the law of his domicile, in the absence of all contracts or other controlling circumstances in relation thereto. But his rights in relation thereto arising under contracts made by or with his assent affecting such property are to be determined by the law of the place of performance. Thus it is said:

"In regard to the merits and rights involved in actions, the law of the place, where they originated, is to govern; *In iis, quæ spectant decisoria causæ, et litis decisionem, inspiciuntur statuta loci, ubi contractus fuit celebratus.*" (Story, Conf. L., 558, 242, 260, 278; Boullenois, Obs. 46, p. 462; Andrews *vs.* Pond, 13 Pet., 65; Bank of the United States *vs.* Donnally, 8 Pet., 372; Wilcox *vs.* Hunt, 13 *Id.*, 378; Wharton, Conf. L., 401.)

In Scudder *v.* Union National Bank, 91 U. S., 406, it is said of a contract that "matters connected with its performance are regulated by the law prevailing at the place of performance."

"It is indisputable," says Wharton, "that there may be in the relation accepted by the parties to a particular territorial law, a ground for the assumption that they have tacitly adopted the provisions of this law as if incorporated in their contract. * * * The form and mode of fulfilment are determined by the law of such place of fulfilment." (See 401, *n.* 1st Ed.)

Government bonds may technically have a situs at the domicile of the owner, but they "are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile." (*Vaughn v. Northup*, 15 Pet., 1.)

The application of these principles to the claim now made by the husband is conclusive against it. The issue and registration of the bonds in the name of the wife with the husband's assent, express or implied, was equivalent to a valid post-nuptial contract, by which they were settled on her, and became her sole and separate property. The marital rights of a husband in government bonds owned by the wife at marriage, or which come to her subsequently by gift, devise, or otherwise, will always be recognized, on his application for that purpose, when they have not been waived. But as to bonds registered in the wife's name after marriage, and purchased with her means, or with her husband's consent, the husband has no right, and can exercise no control. Further than this, this case does not require a decision.

But it is not to be understood that the United States in selling its bonds is limited by all the rules of the common or statutory law of other nations, or of our States, affecting the rights of husband and wife. The acts of Congress under which loans were made, so far as they prescribe rules of law, or give authority, or confer rights, are higher than all other laws. The act of March 3, 1865 (13 Stats., 468, sec. 2), authorized the Secretary of the Treasury to issue bonds and dispose of them "either in the United States or elsewhere, in such manner, and at such rates, and under such conditions as he may think advisable." The act of July 14, 1870 (16 Stats., 272, sec. 2), authorized the Secretary of the Treasury "to sell and dispose of any of the bonds issued under this act." Large powers were given, and, if the Secretary chose to sell bonds to a married woman, and thus make her the beneficial owner, to whom the United States made its promise to pay, it is difficult to perceive any reason why such obligation was not valid and to be complied with according to its terms. The act of March 18, 1869 (16 Stats., 1), pledged the public faith "to discharge all just obligations to the public creditors." Married women were included in this phrase. But it is not necessary to go beyond the actual questions now presented for decision.

The First Comptroller is charged with the duty of settling the accounts of the Treasurer of the United States, and must, therefore, pass upon the validity of indorsements of interest checks presented as vouchers in his accounts. (Rev. Stats., 305.) The interest checks in question cannot lawfully be indorsed by, or paid to, the claimant. They can only be indorsed by, and paid to, the proper guardian or committee of the payee, who is insane. The bonds cannot be transferred to the claimant or on his indorsement. They can only be controlled by the proper guardian or committee of the payee therein. And here arises the question, From what jurisdiction must the authority of the guardian or committee come?

It is well settled that, at common law, a guardian or committee, as well as an executor or administrator, appointed in a foreign jurisdiction, cannot maintain a suit in the judicial tribunals of this country as to tangible property or ordinary claims, except by force of a statute authorizing it. Thus Story says:

"No foreign guardian can *virtute officii* exercise any rights or powers or functions over the movable property of his ward which is situated in a different State or country from that in which he has obtained his letters of guardianship. But he must obtain new letters of guardianship from the local tribunals, authorized to grant the same, before he can exercise any rights, powers, or functions over the same." (Conf. Laws, 504 *a*, 499, 512, 513; 3 Burge, Comm. on Col. & For. L., Pt. 2, ch. 23, sec. 5, p. 1010, 1011; Morrell *vs.* Dickey, 1 Johns. Ch., 153; Kraft *vs.* Wickey, 4 Gill & Johns, 340; 4 Cowen, 529, *n.*; see McNamara *vs.* Dwyer, 7 Paige, 241.)

As to administrator: (Fenwick *v.* Sears' adm'rs, 1 Cranch, 259; Dixon's ex'rs *v.* Ramsay's ex'rs., 3 *Id.*, 319; Ker *v.* Moon, 9 Wheat., 565; act of Congress June 24, 1812, 2 Stats., 758, sec. 11, ch. 106; Vaughn *v.* Northup, 15 Pet., 1; Mackey *v.* Coxe, 18 How., 100; Kane *v.* Paul, 14 Pet., 33; Wharton, Conf. L., 604, note, with many authorities collected; Aspden *v.* Nixon, 4 How., 467; Smith's adm'r *v.* Union Bank of Georgetown, 5 Pet., 518; Noonan *v.* Bradley, 9 Wall., 394; Rice *v.* Houston, adm'r, 13 *Id.*, 66; Parsons *v.* Lyman, 20 N. Y., 103; Petersen *v.* Chemical Bank, 32 *Id.*, 21; Pond, adm'r, *v.* Makepeace, 2 Metc., Mass., 114; Stevens, adm'r, *v.* Gaylord, 11 Mass., 263; Abbott, adm'r, *v.* Coburn, 28 Vt., 663.)

The rule has sometimes been carried so far as to hold that the voluntary payment of a debt at the domicile of the debtor to a foreign administrator is no defense to a suit by an administrator subsequently appointed at such debtor's domicile. (Wharton, Conf. L., 626, *n.*; Anon. 2 Am. Law Rev., 359; Noonan *v.* Bradley, 9 Wall., 394; Curtis *v.* Smith, 6 Blatchf. C. C., 537; Story, Conf. L., 515 *a*; Currie *v.* Bircham, 1 Dowl. & Ryl., 35; Tyler *v.* Bell, 1 Keen, 826; 2 Mylne & Craig, 109; Atty. Gen'l *v.* Dimond, 1 Crompt. & Jarv., 370; Preston *v.* Lord Melville, 8 Clarke & Finn., 14.) Other authorities hold such payment a valid discharge everywhere. (Story, Conf. L., 515, 513, 514, 518, 519, 520, 525; Stevens, admr., *v.* Gaylord, 11 Mass., 256; Doolittle *v.* Lewis, 7 Johns. Ch., 49; Shultz *v.* Pulver, 3 Paige, 182; Hooker *v.* Olmstead, 6 Pick., 481; Alkyns *v.* Smith, 2 Atk., 63; Trecothick *v.* Austin, 4 Mason, 33; Huthwaite, admr., *v.* Paire, 1 Mann. & Grang., 159; Anderson *v.* Caunter, 2 Mylne & Keene, 763; Wilkins *v.* Ellett, admr., 9 Wall., 740.)

In Vroom *v.* Van Horne (10 Paige, N. Y. Ch., 557) it is held that a foreign executor may take charge of property in this country, or receive payment of debts due, but only "where there is no conflicting grant of letters here." (Despard *v.* Churchill, 53 N. Y., 192; Stone *v.* Scripture, 4 Lansing, N. Y. S. C., 186.) In Mackey *v.* Coxe, (18 How., 104) it is said:

"Although an executor or administrator cannot sue in a foreign court,

in virtue of his original letters of administration, yet he may lawfully, under that administration, receive a debt voluntarily paid in any other State. *Stevens vs. Gaylord*, 11 Mass. R., 256. In *Doolittle vs. Lewis*, 7 John. Ch., 49, Chancellor Kent held, that a voluntary payment to a foreign executor or administrator was a good discharge of the debt. *Shultz vs. Pulver*, 3 Paige, 182; *Hooker vs. Olmstead*, 6 Pick., 481."

It was, doubtless, because of this condition of the common law that Congress passed the act of June 24, 1812 (2 Stats., 758, sec. 11), which authorized "any person * * * to whom letters testamentary or of administration hath been or may * * * be granted * * * in any of the United States or * * * Territories thereof, to maintain any suit * * * and recover any claim in the District of Columbia." This gave authority to such executor or administrator "to prosecute and recover claims * * * against the government." (*Vaughn vs. Northup*, 15 Pet., 7; *Mackey vs. Coxe*, 18 How., 100; *Kane vs. Paul*, 14 Pet., 35.) It did not apply to guardians nor to executors or administrators appointed in foreign nations. As to these, their powers rest on the common-law rules or on executive regulations. This section of the act of 1812 has not been carried into the Revised Statutes of the United States nor of the District of Columbia, but section 6 of the act is carried into section 829 of the Revised Statutes of the District of Columbia, and the residue of the act encounters the repeal, enacted by section 1296 of the revision.

It may be regarded as sufficiently settled, that foreign executors, administrators, and guardians may lawfully receive of the proper officers voluntary payment of their claims against the government, at least when there are no conflicting letters testamentary, of administration, or of guardianship. The law, as recognized in the Supreme Court of the United States, should generally be applied in the practice of the executive departments. There may be cases, however, in which it cannot be applied. The common law of the executive departments arises from long usage and from the decisions of executive officers. This common law is entitled to respect in courts, and is generally recognized. (*United States v. Moore*, 95 U. S., 763; *Edwards v. Darby*, 12 Wheat., 210; *United States v. State Bank of North Carolina*, 6 Pet., 29; *United States v. Macdaniel*, 7 Pet., 1; *United States v. Bowen*, 100 U. S., 511.) The rights of all parties, when acted upon, and after payments are made in pursuance of authorized decisions, should be, and doubtless will be, concluded as to all questions arising thereafter, and in relation thereto, in courts, as well as elsewhere. This result arises from principles of law and reason.

The powers of the government are distributed among the three great departments, legislative, executive, and judicial. A subject intrusted to the exclusive jurisdiction and decision of either department is generally conclusive on the others. (*Draft Case*, 1 Lawrence, Compt. Dec., 11.) Thus, a political question decided by the executive department

cannot be reversed by the judiciary. (*Luther v. Borden*, 7 How., 1; *Kennett v. Chambers*, 14 How., 38; *State of Georgia v. Stanton*, 6 Wall., 50.)

It may be regarded as a fixed rule in the Treasury Department, settled by long usage, by a long course of decisions by the proper officers, and by considerations of utility and public policy, if not of necessity, that payment of a public debt to the foreign guardian of an alien is fully authorized and valid. As far as government bonds, or other negotiable public securities are concerned, the public credit would suffer in the eyes of all foreigners, and, it may well be supposed, in the estimation of our own citizens, if the Treasury Department refused to recognize the authority of foreign guardians. The authority of foreign executors and administrators is to be deemed equally entitled to recognition, especially if there is no administration in this country, and if it is shown that there are no creditors here entitled to be satisfied from assets here. The rule of common law, that an administrator in a State of this Union of a deceased citizen thereof has no authority to maintain a suit in the District of Columbia to recover a debt due his intestate from a resident here, cannot be applied to claims against the United States without great inconvenience. Whatever may be the law as to ordinary claims, no such rule can be applied to negotiable public securities. It would seriously affect the public credit, and be contrary to the common understanding of lawyers in the States, to hold that administration must be taken out in the District of Columbia to collect interest on registered government bonds, or the principal when due, before payment could be made, in case of the death of a citizen who has held them in the State of his domicile. This cannot be the law. As to government bonds and interest checks, there is a sound principle, upon which an executor, administrator, or guardian in any one of our States or Territories is authorized to receive payment thereof. The bonds are negotiable by express statute, and the form adopted. The interest checks are equally so. (*The Floyd Acceptances*, 7 Wall., 666; *McKnight's Case*, 13 Court Cl., 305.) An executor, administrator, or guardian, duly appointed at the domicile of the decedent, or ward, in a State or Territory of the United States, is fully authorized to receive payment of negotiable public securities of the United States. Thus it is said in *Rorer on Inter-State Law*, 248 and 249:

"The proper jurisdiction in which to obtain letters testamentary or of administration is in the State and place of the decedent's domicile, at the time and place of his death." (*Crosby vs. Leavitt*, 4 Allen, 410; *Christy vs. Vest*, 36 Iowa, 285; *Chamberlin vs. Wilson*, 45 Iowa, 149; 1 *Williams on Executors*, 495, *et seq.* 6th Am. Ed., top paging). "If there be assets in another State or States, and administration be obtained there, such administration is *ancillary* to that of the administrator or executor acting as such at the place of the decedent's domicile, at and immediately preceding his death." (*Probate Court vs. Kimball*, 42 Vt., 320; *Chamberlin vs. Wilson*, 45 Iowa, 149.) * * * "It is well settled

that an administrator of a deceased person cannot be appointed by a court of a State other than that of his domicile at his death, if in such other State he left no estate." (Crosby *vs.* Leavitt, 4 Allen, 410; Miller *vs.* Jones, 26 Ala., 247; Grimes *vs.* Talbert, 14 Md., 169; Thumb *vs.* Gresham, 2 Met., Ky., 306; Broughton *vs.* Bradley, 34 Ala., 694; Jeffersonville R. R. Co. *vs.* Swayne, 26 Ind., 447.)

In Vaughn *v.* Northup (15 Pet., 1) it was decided that—

"The debts due from the Government of the United States, have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile: but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to be treated like the debts of a private debtor, which constitute local assets in his own domicile."

An ancillary administrator may be appointed in a State where a debtor is found owing the estate of a decedent domiciled and dying in another State. But government bonds are not assets in any State except that of the domicile of the deceased. This is in law their situs. The reasonable inference is that a foreign executor, administrator, or guardian may generally receive payment of United States bonds. Many difficult questions may arise under our system of government as to the rights of an executor or administrator.

In what State of the Union should an executor or administrator be appointed? If in any one, would that exclude such appointment in another? If the laws of the State in which the first appointment is made should require the creditors domiciled there to be paid in preference to, or exclusion of, those domiciled in another, great injustice would be done. There would be some reason in holding that, as to ordinary negotiable securities made by private debtors, an executor or administrator appointed at the domicile of the decedent might sue for and recover debts due from debtors in another State, but the weight of authority is against it. It is said by Story that—

"Where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to the deceased, which are payable to bearer, * * * he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name; and he need not take out letters of administration in the State where the debtor resides, in order to maintain a suit against him." (Story, Conf. L., 517, 359, 516; 1 Daniel, Negotiable Instruments, 883; Wharton, Conf. L., 457; 2 Parsons, Notes and Bills, 373; Robinson *vs.* Crandall, 9 Wendell, 425; Dixon *vs.* Ramsey, 3 Cranch, 319; Harper *vs.* Butler, 2 Peters, 239; Pond, admr., *vs.* Makepeace, 2 Metc., 114; Huthwaite, admr., *vs.* Phaire, 1 Mann. & Grang., 159; Rand, admr., *vs.* Hubbard, 4 Metc., 259; Barrett *vs.* Barrett, 8 Greenl., Bennett's Ed., 353; Trimbey *vs.* Vignier, 1 Bing. N. C., 151; Rawlinson *vs.* Stone, 3 Wilson, 1; S. C., 2 Str., 1260; Trecothick *vs.* Austin, 4 Mason 16; Vanquelin *vs.* Bouard, 15 C. B., N. S., 341.)

Whether the same rule shall be applied to foreign executors or administrators having the custody of government bonds need not now be decided.

The "regulations" of the Treasury Department may properly determine this question as to government bonds.* (7 Op., 240.)

The interest checks in question may be indorsed by and paid to the proper guardian or committee duly appointed in Sweden. The record of the authority of such guardian or committee must show an adjudication of the question of insanity, and the appointment of a guardian or committee by a competent judicial tribunal in a proceeding to which Madam de Bildt is a party. (Saflu's Case, 1 Lawrence, Compt. Dec., 214.) If it be found inexpedient to secure the appointment of a guardian or committee in Sweden, and an appointment can be made on the application of the husband in the District of Columbia, it may be recognized. The Maryland statute of March 10, 1786, ch. 72, sec. 6, in force in the District (1 Dorsey's Laws, 211), authorizes the chancellor "to superintend, direct and govern the affairs" of "lunatics," "both as to the care of their persons and management of their estates," and to "appoint a committee, trustee or trustees, for such persons, and may make such orders and decrees respecting their persons and estate as to him may seem proper."

The claimant will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, May 12, 1882.

* The existing regulations are as follows:

ASSIGNMENTS BY REPRESENTATIVES AND SUCCESSORS.

In case of death or successorship, the representative of the deceased person, or the successor, must furnish official evidence of such decease or successorship, and of his own appointment, authority, or power. An executor or administrator may assign bonds standing in the name of the deceased person in whose stead such executor or administrator shall be acting. Where there are two or more legal representatives, all must unite in the assignment, unless by a decree of court or testamentary provision some one or more of them is or are designated and empowered to dispose of the bonds. If the bonds had been held by the deceased in the capacity of a fiduciary or trustee, the letters testamentary, or of administration, must be accompanied by an order of the court authorizing the contemplated transfer.

An executor, administrator, trustee, guardian, or attorney cannot assign bonds to himself, unless he be specially authorized to do so by a court possessing jurisdiction of the matter.

FOREIGN SUCCESSORSHIP ASSIGNMENTS.

Where a payee, at the time of his death, was a resident of a foreign country, the party claiming to direct and execute the transfer must furnish an exemplified copy of the will or other instrument conveying the requisite authority, duly certified under the hand and seal of the proper officer, attested by the certificate of a United States minister, chargé, consul, vice-consul, or commercial agent, or, if there be none such accessible, (which fact shall, in such case, be certified,) by that of a notary public, to the effect that such exemplified copy is executed and granted by the proper tribunal or officer, and is in due form and according to the laws of that country. The assignment should be executed as hereinbefore directed.

IN THE MATTER OF THE PAYMENT BY PUBLIC DEPOSITARIES OF PENSION CHECKS HAVING SEVERAL INDORSEMENTS.—KENNARD'S CASE.

1. The practice stated under which money is advanced to, and pensions are paid by, pension agents as disbursing officers.
2. The accounts of pension agents are settled in the offices of the Third Auditor and Second Comptroller on vouchers executed by pensioners.
3. If an assistant treasurer or other depositary of public moneys of the United States, with whom a pension agent has deposited money for the payment of pension checks, pay a pension check to a holder under a forged or unauthorized indorsement, he is liable for the amount so improperly paid.
4. He is not relieved from liability in such case by the fact that he has made payment according to the usage of banks in paying checks, and has exercised reasonable and ordinary care to ascertain the party properly entitled to payment.
5. The right of the United States does not, in such case, rest on an implied contract of bailment, but on the express contract of the depositary's official bond; hence, if a public depositary pay a pension check to a holder under a forged or unauthorized indorsement, he may be held liable on his bond to the United States.

March 25, 1882, M. P. Kennard, Assistant Treasurer of the United States, at Boston, addressed a letter to the First Comptroller, saying:

I have respectfully to submit a copy of the indorsements of three pension checks paid at this office, and which are but samples of hundreds of pension checks presented for payment.

Sample 1.

(Stamped :) Jenette L. Kimball, payee, pay to the order of the Montpelier Nat. Bank, Montpelier, Vt.

SPRAGUE & WELLS,
Cabot, Vt.

(Stamped :) Pay to the order of the National Revere Bank, Boston, Mass., for collection for acct. of the Montpelier Nat. Bank, Montpelier, Vt. E. D. Blackwell, Cashier.

GEO. C. SHEPARD,
V. President.
H. BLASDALE,
Cashier.

(Across the face, stamped :) E. D. Blackwell, Cash.

Sample 2.

John C. Lerris, payee, * [pay Union Trust Co. or order deposit account of the Southington Lumber & Feed Co.

CHARLES D. BARNES,
Treas.]

[Pay E. Townsend, cashier, or order for collection for acct. of Union Trust Co., New Haven, Conn.

W. J. BARTLETT,
Treas.]

* The matter inclosed in brackets is marked "stamped" in the original.

[Pay Nat. Revere Bank, Boston, Mass., or order, for collection for acct. of the Importers & Traders' Nat. Bank of New York.]

W. H. PERKINS,
Ass. Cashier.
H. BLASDALE,
Cashier.

Sample 3.

Solomon Leonard, payee.

[Pay to the order of the Bangor Foundry & Machine Co.

C. R. HAUGHTON.] *

[Bangor Foundry & Mac. Co.

J. S. WHITMAN,
*Treas.] **

[Endorsement guaranteed.

WM. C. HOLT,
*Cashier.] **

[For collection on acct. of the Veazie Nat. Bank of Bangor.

WM. C. HOLT,
Cashier.] †

J. S. LAROYD,
Cashier.

The first check was returned to bank for the written endorsement of E. D. Blackwell, Cas.; it was presented a second time with the written endorsement of Geo. C. Shepard, V. Prest. The third check was returned for the Ctf. of Treas. of Bangor Mac. Co.; it was returned with the guarantee of Wm. C. Holt, cashier. Checks drawn on this office have passed through a bank in Colorado, and bear the endorsement of the ass't cashier. Checks are endorsed payable to order of a firm, and endorsed by their clerk. In fact, there is every conceivable manner of endorsement, causing a great amount of labor and annoyance to this office, as well as to the banks who present them for payment, and to whom they are returned for uniformity of endorsement.

By endorsement they are made payable to Nat. Banks, and are endorsed by Prest. or Asst. Cashier, and when endorsed payable to Savings Banks, Companies, or Societies, are endorsed by Treasurers or Secretaries; and until they reach this office through some local bank bearing the endorsement of its cashier or other authorized officer, there is often not an endorsement strictly regular. To require a ctf. from all Presidents, V. Prests., Asst. Cashiers, Treasurers, and Secretaries, of their authority to endorse, causes a vast amount of trouble, which can be obviated by the acceptance of the guarantee of the last endorser.

For this office to undertake to obtain a perfect series of endorsements running through the various hands into which these checks often fall, seems tantamount to an education of a large portion of the New England financial institutions and business concerns, in what the Department may deem strictly regular, and if persisted in would produce no end of irritation and delay inconvenient to the pensioner and all concerned. We have often a thousand checks in a day from some of the Banks, and some twenty-five or more of these have to be returned for informalities of endorsements.

* Written in original.

† Stamped in original.

I beg to inquire if these checks, when endorsed by the payee and finally by the bank presenting them, are not sufficiently endorsed for payment, the last endorser when known, being a sufficient guarantee for all before him, without reference to incidental or intermediate informalities, such being the ruling among the Banks themselves.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Pension agents are disbursing officers charged with the duty of paying pensions. (Rev. Stats., 4778, 4780.) Money is advanced to them upon their requisition for that purpose. (Rev. Stats., 3648; Chap. XV., Appx., 1 Lawrence, Compt. Dec. 2d ed., 592, 617). They are required to deposit the money so advanced "with the Treasurer or some one of the assistant treasurers of the United States," or "in places, * * * where there is no treasurer or assistant treasurer, * * * in any other public depository, or * * * in any other manner" specially authorized in writing by the Secretary of the Treasury (Rev. Stats., 3595, 3620, 5488), and to pay pensions by check to *the order* of the pensioner, drawn on such treasurer or designated depository. (Rev. Stats., 4765, 3620; act Feb'y 27, 1877, 19 Stats., 249.)

Each pensioner executes a voucher to the proper pension agent for pension paid. (Rev. Stats., 4764.) The accounts of the pension agents are settled on these vouchers through the offices of the Third Auditor (Rev. Stats., 277) and Second Comptroller (Rev. Stats., 273). The pension checks drawn on the Treasurer, proper assistant treasurer, or other public depository, constitute the vouchers of the latter officers for settlement with the pension agent of the account of money deposited to the credit of the latter. There is, generally, no settlement by any accounting officer of an account of the money so deposited. The question whether the Treasurer, assistant treasurer, or other public depository has fully and properly paid out such money is one between him and the pension agent, except only that the former officers may, doubtless, be held liable on their bonds for a failure to account for the whole amount deposited with them. (Rev. Stats., 3600, 3620.)*

The depository is required by Treasury Department Regulations of August 24, 1876, to furnish every disbursing officer making deposits "with a monthly statement of his deposit account."†

As between banks and their depositors the rule is, that, "where a check is drawn payable to the order of any actually existing person or corporation, if the order or indorsement of such payee is forged, payment by the bank is no acquittance."‡

* For this purpose an account could be stated against the depository by the proper accounting officers. (Rev. Stats., 236, 269.)

† For this circular containing many provisions as to checks, disbursing officers, and depositories, see 1 Lawrence, Comptroller's Decisions, Appendix, ch. XV, p. 642.

‡ Morse on Banks and Banking, 350, citing *Vanbibber v. Bank of Louisiana*, 14 La. Ann., 481; Sharswood's note to Byles on Bills, star page 21; *Morgan v. Bank of State of New York*, 1 Duer, 434; *Graves v. American Exchange Bank*, 17 N. Y., 205; *Cogill v. American Exchange Bank*, 1 N. Y., 113; *Weisser v. Denison*, 10 N. Y., 68; *Talbot*.

The same rule is applicable as between the United States and a depository, for in law and in fact it is the government and not the disbursing officer that makes the deposits against which disbursing officers draw checks. The depository will not have acquitted himself from liability to the government by the payment of a pension or other disbursing officer's check on a forged or unauthorized indorsement of the payee. (Cook *v.* United States, 19 Int. Rev. Rec., 172; s. c., 6 Abb. Nat. Dig., 111; Espy *v.* Bank of Cincinnati, 18 Wall., 605; Kimbro *v.* First National Bank of Washington, 1 MacArthur, 415; 4 Op. Att. Gen., 307.)

In the case of a check drawn by a disbursing officer on a public depository, properly indorsed by a payee, and containing several other and successive indorsements, any one of which is forged or otherwise invalid, payment to any holder under the invalid indorsement or to a subsequent indorsee, would be unauthorized, and would not give the depository a right to credit therefor.* The depository assumes, by virtue of his office or employment, the risk of payment to the rightful holder, and pays at his own peril. This, of course, refers to checks with indorsements in full. A valid *blank indorsement* authorizes payment to any holder, unless the depository have knowledge, or be in some way chargeable with notice of the rights of other parties.†

Among banks the usage undoubtedly is to pay checks presented by a

vs. Bank of Rochester, 1 Hill, 295; Canal Bank *vs.* Bank of Albany, *Id.*, 287; Story on Bills, § 451. The statute of 16th and 17th Victoria, ch. 59, recognizes the common-law rule by changing it so that a banker is exempt from liability if the original or any subsequent indorsement be forged. Hare *vs.* Copland, 13 Ir. C. L., 426. The common-law rule is supported by many cases. United States *vs.* Morgan, 11 How., 159. "The right of the government does not rest on the implied contract of bailment, but on the express contract found in the bond, to pay over the funds." United States *vs.* Keebler, 9 Wall., 83, 88; Boyden *vs.* United States, 13 Wall., 17; State Bank *vs.* Chetwood, 3 Halst., 1; Brandt, Suretyship, § 478; District Township of Union *vs.* Smith, 39 Iowa, 9.

* "If there be any forged indorsement the indorser [indorsee] cannot recover against any party prior to it Chitty on bills [260, 261], 297, and the subsequent indorser has transferred a thing to which he himself had no right or title." (1 Daniel Neg. Inst., § 672.)

† The effect of indorsements in full and in blank is fully discussed in 1 Daniel, Neg. Inst., §§ 677, 693, 694, 695, 696. An informal indorsement in full may charge a depository with notice of the rights of the party making it, and of the party holding under it. (Wade's Law of Notice, §§ 10, 37; Sterry *vs.* Arden, 1 Johns. Ch., 261.)

"The rule which allows a payee of negotiable paper [or other party thereto] to strike out subsequent special indorsements, and which presumes ownership from possession, does not extend to an action brought by him as trustee in the right of another." Fremont & Roach's Case, 4 Court Claims, 256. As to the rule, see Dugan *v.* United States, 3 Wheat., 172; Morgan *v.* Reintzel, 7 Cranch, 273; United States *v.* Barker, 1 Paine C. C., 156; Conant *v.* Wills & Bradley, 1 McL. C. C., 427; Cox *v.* Simms, 1 Cranch C. C., 238; Oneale *v.* Beall, 2 *Id.*, 569; Picquet *v.* Curtis, 1 Sumner, 478; Cassel *v.* Dows, 1 Blatchf., 335; *contra*, Welch *v.* Lindo, 7 Cranch, 159; Craig *v.* Brown, 1 Pet. C. C., 171.

holder under a well-known and responsible indorser. Each indorsement is a guarantee of the genuineness of all prior indorsements.*

A bank having paid a check with sundry indorsements thereon has, generally, by the use of proper diligence, in case of non-payment, a remedy severally against each of the prior indorsers.† But a public depositary of United States moneys cannot excuse himself from liability by adopting such usage of banks. He does not occupy the position of a cashier of a bank who is relieved of personal liability to the bank when he has exercised ordinary diligence and care by pursuing the ordinary usage. (Brandt, Suretyship, § 479; Morse on Banks, 198; Morris Canal & Banking Co. v. Van Vorst's Admx., 1 Zabriskie, 100; Union Bank v. Cloney, 10 Johns., 271; Rogers v. Kelly, 2 Campb., 123; Minor v. Mechanics' Bank of Alexandria, 1 Pet., 46; American Bank v. Adams, 12 Peck, 303; Union Bank v. Clossey, 10 Johns., 271; Barrington v. Bank of Washington, 14 Serg. & R., 405; Rochester City Bank v. Elwood, 21 N. Y., 88; Allison v. Faumers' Bank, 6 Rand, 204; Planters' & M. Bank v. Hill, 1 Stew., 201.)

The assistant treasurer will be advised in accordance with this opinion.‡

TREASURY DEPARTMENT,

First Comptroller's Office, July 4, 1882.

* In 1 Daniel, Negotiable Instruments, § 672, it is said: "The indorser contracts that the bill or note is in every respect genuine. * * * This principle applies to the signatures of the drawer, acceptor, and maker * * * who are the original parties. * * * Whether or not the indorser's engagement extends to the genuineness of prior indorsements, is not so well settled. Undoubtedly, the indorser *admits* their genuineness, as he is estopped to deny his title, which would otherwise be invalid, and notwithstanding the doubts and dissents which have been expressed, it is clear upon principle that the indorser warrants the instrument throughout. If there be any forged indorsement the indorser [indorsee] cannot recover against any party prior to it." (Story on Bills, § 108, 111, 190; Story on Notes, § 138, 193, 380; 1 Parsons, Notes and Bills, 25, 218; 2 *Id.*, 588; Chitty on Bills, 13 Am. Ed., [82, 90, 95, 243,] 98, 116, 277; Roscoe on Bills, 123; Bayley on Bills, ch. 12, p. 369; Byles, Sharswood's Ed., [135,] 250; Johnson on Bills, 32; Thompson on Bills, 82; Edwards on Bills, 289, 350; East India Co. v. Tritton, 3 B. & C., 280; Lake v. Haynes, 1, Atk., 281; Heylyn v. Adamson, 2 Burr., 669; Battingalls v. Gloster, 3 East, 483.)

† 2 Daniel on Negotiable Instruments, § 1203.

‡ See in connection with this subject:

Rhawn's case, 1 Lawrence, Compt. Dec., 109; Moyer's case, *Id.*, 116.

For the "Regulations" of August 24, 1876, as to disbursing officers, see 1 Lawrence, Comptroller's Decisions, Appendix, ch. xv, p. 638 (2d ed.).

And see Treasury circular of April 6, 1881, which is a revision of that of October 22, 1878 (Moyer's case, 1 Lawrence, Compt. Dec., 124), as follows:

[CIRCULAR.]

INDORSEMENT AND PAYMENT OF TREASURY DRAFTS AND POST-OFFICE DEPARTMENT WARRANTS.

[1881. Department No. 37. Treasurer's Office, No. 37.]

TREASURY OF THE UNITED STATES,

Washington, D. C., April 6, 1881.

Treasury drafts and post-office warrants must not be paid until the indorsements conform to the following regulations:

1. The name of the payee, as indorsed, must correspond in spelling with that on the

IN THE MATTER OF AN EXECUTOR'S CLAIM FOR A TRANSFER TO HIMSELF, AS TRUSTEE, OF UNITED STATES BONDS REGISTERED IN THE NAME OF A DECEASED EXECUTOR, HIS TESTATOR—TAYLOE'S CASE.

1. When, without notice of any other trust, bonds of the United States have been registered in the name of an executor, the government incurs no liability by dealing with him or his successor in relation to such bonds, although other parties may be the equitable owners thereof, or beneficiaries therein as *certain que trust*, and notice of such ownership or interest be afterwards given to the Secretary of the Treasury.
2. When an executor dies having bonds registered in his name, as executor, such bonds being assets of the estate of his testator, his successor in the trust is generally the proper party to control such bonds. The administrator *de bonis non* with the will annexed of the original testator is the proper successor, and not the executor or administrator of the deceased executor.
3. An executor may, as a trustee, have powers and duties separate and distinct from those as executor. Upon the death of such an executor his powers in regard to such separate trust should, generally, be performed by a new trustee, and not by his executor or administrator.

face of the draft; no guarantee of an indorsement, imperfect in itself, can be accepted. If the name of a payee as written on the face of a draft is spelled incorrectly, the draft should be returned to the Treasurer United States for correction.

2. Indorsements by mark (X) must be witnessed by two persons who can write, giving their places of residence.

3. Indorsements by executors, administrators, guardians, or other fiduciaries must be accompanied by certified copies, under seal, of letters testamentary, letters of administration, of guardianship, or other evidence of fiduciary character, as the case may be.

4. Payees and indorsees must indorse by their own hands; officials, officially with full title; firms, the usual firm-signature by a member of the firm, not by a clerk or other person for the firm. [See Agency-Delegation Case, *ante* 60.]

5. Every indorsement must be by the proper written (not printed) signature of the person whose indorsement is required.

6. Powers of attorney for the indorsement of drafts in payment of claims must state the number, date, and amount of draft, and number and kind of warrant, and be dated subsequently to the date of the drafts; must be witnessed by two persons, and must be acknowledged by the constituent before the Treasurer of the United States or an assistant treasurer, a judge or clerk of a district court of the United States, a collector of customs, a notary public under his seal, or a justice of the peace in those States only in which such justice has authority to take acknowledgments of deeds, or commissioner of deeds; if before either of the two latter, the certificate and seal of the county clerk as to the official character and signature of the justice or commissioner is required. If executed in a foreign country, the acknowledgment must be made before a notary public, with his seal attached, or a United States consul or minister. The officer taking the acknowledgment must certify that the letter of attorney was read and fully explained to the constituent at the time of acknowledgment, and that said constituent is personally well known to him to be the identical person named in and who subscribed his name to said power of attorney. (See Revised Statutes, secs. 1778 and 3477.)

7. Evidence of authority to indorse for incorporated or unincorporated companies must accompany drafts drawn or indorsed to the order of such companies or associations. Such evidence should be in the form of an extract from the by-laws or records of the company or association, showing the authority of the officer to indorse and re-

4. If it be shown by reasonably clear evidence that United States bonds registered in the name of an executor should be registered in the name of and held by another person as trustee for the benefit of specified parties, the United States may file a bill of interpleader, or the parties may be required to have their respective rights determined by decree in equity, so that the bonds may be disposed of in accordance with the proper judicial determination.
5. An executor should not generally be permitted to transfer United States bonds to legatees under the will, until it is shown that the rights of creditors of the estate are satisfied.
6. The general common-law principles stated, relative to the powers and duties of executors and administrators of deceased executors and administrators (1) to administer assets unadministered by their testators or intestates, and (2) to administer trusts with which their testators or intestates were charged as to personal estate.

Certain four per cent. bonds of the United States—consols of 1907—are registered in the name of “Edward Thornton Tayloe, executor of William H. Tayloe, deceased,” viz: Bonds Nos. 94350 and 94352, for \$1,000 each, No. 21901, for \$5,000, and No. 34678, for \$10,000. December 31, 1881, said Edward Thornton Tayloe, executor as aforesaid, died testate in the District of Columbia, and William Tayloe Snyder duly qualified in said district as his sole executor. Mr. Snyder alleges, and proposes

ceive and receipt for moneys for the company, and giving his name and the date of his election or appointment, which extract must be verified by a certificate under seal signed by the President and Secretary or by one of these officers and not less than two of the directors; which certificate must state that such authority remains unrevoked and unchanged. If the company have no seal, the extract should be certified as correct by a notary public or other competent officer under his seal. When a resolution is adopted at a special meeting of directors, it must be shown that all had notice of the time and place of such meeting and that a quorum assented to the resolution.

8. The indorsement of all the joint holders or co-trustees, executors, administrators, guardians, or other fiduciaries will be required on drafts, and in the execution of a power to a third party to collect, all must join. In case of the death of either, the survivors will be recognized as having full authority, upon due proof of such death and survivorship.

JAS. GILFILLAN,
Treasurer United States.

Approved, April 6, 1881:

WM. LAWRENCE,
Comptroller.

Approved:

WILLIAM WINDOM,
Secretary of the Treasury.

The First Comptroller in settling the accounts of the Treasurer of the United States will accept indorsements made on the principles stated by the Secretary as follow:

TREASURY OF THE UNITED STATES,
Washington, November 22, 1881.

SIR: Referring to our conversation on the 19th instant, in regard to foreign indorsements upon checks and drafts of the Treasurer of the United States, I have the honor to recommend that indorsements of incorporated banking institutions in Great Britain, which are received as valid by commercial usage, and which are properly guaranteed by subsequent indorsements, be accepted in the business of the Treasury.

This has been the custom in this office, and the object of this letter is to have de-

to show by affidavits, that, by the last will of John Tayloe—who died February 28, 1829—his executors were directed to invest \$20,000 of the means of his estate in government bonds, to be held in trust for each of his three daughters—including Virginia Tayloe, who is said to be *non compos*, though there has been no adjudication of the fact; that his two sons, Benjamin Ogle Tayloe and William H. Tayloe, became executors of his last will; that said Benjamin died testate February 25, 1868; and that William H. Tayloe, surviving executor, died testate April 10, 1871. Neither the record of the will, nor any written or record evidence, shows that the bonds in question were held by Edward Thornton Tayloe as trustee for said Virginia Tayloe. When the bonds were registered in his name as executor, no representation was made as to any trust in respect of them beyond that of executorship. Said William Tayloe Snyder now asks that he be permitted, as executor of Edward Thornton Tayloe, to assign said bonds to himself as trustee for said Virginia Tayloe, and that new bonds be issued and registered in his name as such trustee; and the question whether this can be done is submitted by the Secretary of the Treasury to the First Comptroller for his opinion thereon.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The legality of payments of interest checks on the bonds in question is a matter for the decision of the First Comptroller, because he is required to settle the accounts of the Treasurer or other officer of the United States who pays them. As questions which may arise as to the ownership of the bonds on their maturity and presentation for payment will also be decided by him, it is now proper to examine these

finite authority from you for the guidance of the sub-treasuries, particularly the sub-treasury in New York.

Very respectfully,

JAS. GILFILLAN,
Treasurer United States.

Hon. CHAS. J. FOLGER,
Secretary of the Treasury.

TREASURY DEPARTMENT, *November 23, 1881.*

SIR: I acknowledge the receipt of your letter of this day referring to an oral communication between you and me, on the subject of the indorsements by incorporated banking institutions in Great Britain, upon checks and drafts presented for payment to the Treasurer or any assistant treasurer of the United States.

In that conversation we agreed in the conclusion that whatever officer of such institution was especially empowered by the by-laws thereof, or was recognized by general commercial usage in that country as authorized to make indorsements for the institution, should be recognized by this department as making a valid transfer of the paper when he indorsed the same for the institution in due form, and made delivery of it, and when the genuineness and authenticity of the signature are sufficiently guaranteed by subsequent indorsements. It is a rule of law that a cashier of a moneyed institution has *prima facie* authority by virtue of his office to transfer and indorse negotiable paper held by the institution for its use and on its behalf; and that, while

questions, and render an opinion thereon for the guidance of the Register or other officer concerned.

The bonds in question stand in the name of Edward Thornton Tayloe in his representative character as executor of William H. Tayloe, deceased. Although the facts may be as claimed, nevertheless the government in dealing with these bonds is under no *imperative obligation* to look beyond those facts which appear on their face and from the record of registry in the Department of the Treasury. There is a wide difference between the trust committed to a person, in his capacity as executor, and one committed to him in some other capacity for the personal benefit of private parties. (Bond-Continuance Case, 2 Lawrence, Compt. Dec., 218; Gandolfo v. Walker, 15 Ohio St., 251; Mathews, adm'r, v. Meek, 23 *Id.*, 272; Wood v. Brown, 34 N. Y., 337; 1 Williams, Executors, [242]; 3 *Id.*, [1796] note *h*; 1 Perry on Trusts, 263.)

There are reasons sufficient to show that the government may lawfully deal with the bonds as they are.

1. The duty of the government is fixed by the contract made in the bonds. The contract was authorized by law and made in good faith, without notice to the government of any trust, except that appearing therein. It is clear that, when a contract is lawfully made by the United States, it may properly be performed according to its terms, without incurring liability to third parties having latent equities. (Klink's Case, 1 Lawrence, Compt. Dec., 242.) Unlike private parties, who may be enjoined for the protection of persons having such equities, the government is not amenable to such judicial jurisdiction. (*Id.*, 252, *n.*; Receiver's Case, *Id.*, 362, 374, *n.*; Bond-Trust Case, 2 *Id.*, 202, *n.*; Case v. Terrell, 11 Wall., 199.) Executive officers have no power to ascertain and determine such equitable rights.

It is perfectly competent for the institution to depart from the general course of business, it is incumbent upon it to show, in order to escape liability on an indorsement made by its cashier, that it had restricted his power in this regard, and that the restriction it had imposed was known to the person taking the paper from the cashier. See the cases collected in 1 Daniels, Neg. Insts., p. 322. [See p. 296 sec. 392.] That rule must apply in the case of any officer or agent, by whatever name, who has a relation to the institution like that of a cashier to a bank, and who discharges for his principal the same duties or kind of duties that a cashier does for his bank. It is possible that in the especial charters or general law under which some of such institutions are organized, there may be some provision as to what officer shall act for it in such a matter. But I apprehend that even in such case the institution could not escape liability to parties who, in good faith, rested on an indorsement made for it by an officer whom it permitted thus to act, and whose action was received and treated by the commercial community as lawfully and authoritatively performed.

I am therefore of the opinion, that the rule stated in the first paragraph of your communication of November 22d may be applied for the guidance of officers in the business of the Treasury.

Very respectfully,
CHAS. J. FOLGER,
Secretary.

JAMES GILFILLAN, Esq.,
Treasurer United States.

2. It is not certain that the Secretary of the Treasury would, in the exercise of his discretionary authority to sell bonds, have consented to issue the bonds in question upon any trust but that named therein. Other trusts might have been regarded as so complicated that the United States should not have been involved in or connected with them.

3. John Tayloe, having by his last will placed it in the power of his sole surviving executor to invest money of the estate as he did, in bonds in his name as executor, those interested in the estate must, in law, so far as the government is concerned, be required to take all the resulting consequences.

The only absolute duties of the government as to the bonds in question are (1) to transfer them to the proper representatives of William H. Tayloe, deceased, upon due application for that purpose; (2) to see that such representative does not before their maturity make an unauthorized transfer of them, and (3) to see that payment shall be made after maturity to such representative.

There is no application for a transfer of the bonds, as upon a sale. If such application were made, the utmost that could be required of the government, on general legal principles, would be to ascertain whether the sale was authorized, either (1) by the law generally, or (2) by the will of the testator; and perhaps there would be, in such case, no duty on the part of the government other than to see that the assignment was valid in form. The government will often have no means of ascertaining facts necessary to protect the rights of parties collaterally interested in matters pending in the executive department; hence these departments cannot be required to decide difficult questions of law or construction arising in relation to wills. The government cannot in such cases see to the application of money to the proper purposes. (*Salmon v. Claggett*, 3 Bland, Ch., 125; *Neale v. Hagthorp*, *Id.*, 551; 2 *Perry on Trusts*, 809; *Keane v. Robarts*, 4 Mad., 356; *Burting v. Stonard*, 2 P. Wms., 150.) It is not necessary on the part of the government to inquire whether, in the absence of authorized "regulations," the executor might make a sale by assignment, according to the terms of the bond, without reference to the particular provisions of the will or the law generally governing the duties of executors. The "regulations" of the Department of the Treasury may, to some extent, affect these questions of transfer. (1 *Lawrence*, Compt. Dec., Appx. xiii, 2d ed., p. 560.)

As the executor of William H. Tayloe is deceased, the only transfer of the bonds, which are registered in the said executor's name, which could now be permitted would be one made to or by his proper successor, the administrator *de bonis non* with the will annexed, of William H. Tayloe, deceased; he would be responsible for their administration. This is the result of general principles of law. Thus, in *Beall v. New Mexico* (16 Wall., 541), the general principle is stated that "to the administrator *de bonis non* is committed only the administration of the goods, chattels, and credits of the deceased which have not been administered.

He is entitled to all the goods and personal estate which remain in specie."* (1 Williams, Executors, 781, 4 Am. ed.; *Id.*, 6 Am. ed. [539], note b.) At common law, in England and in some of the American States the executor of a deceased executor not only administers the unadministered assets of the first testator, but also the trusts of personal estate with which his testator, the deceased executor, was charged. But this has been changed by the statute of Maryland as to unadministered assets of the first estate. (Ch. 101, sub. ch. 5, sec. 6, of 1798, 1 Dorsey; Laws Md., 384; 2 Kilty, Laws Md., ch. 101; Thompson's Dig. Laws Dist. Col., sec. 32, 41; *Scott v. Fox*, 14 Md., 397; *Alexander v. Stewart*, 8 Gill. & Johns., 226; *West's Executor v. Hall*, 3 Har. & J., 221.)

The statute is as follows :

"SEC. 6. In case any executor, executrix, administrator, or administratrix, shall die before the estate shall be fully administered, letters of administration *de bonis non* shall be granted to the person entitled agreeably to the rules hereinbefore laid down, and the proceedings shall in all respects be the same as if administration had been originally granted; and in no case shall the executor of an executor be entitled, as executor, to administration *de bonis non* of the first deceased; and the letters, bond and oath, of an administrator *de bonis non* shall be in the form hereinbefore directed, except that the words 'not already administered,' shall be added in the proper places." (And see act February 20, 1846, ch. 8, sec. 3, 9 Stats., 4; Rev. Stats., Dist. Col., 976.)

This statute of 1798 is in force in the District of Columbia. (Rev. Stats. of D. C., 92; act February 27, 1801, ch. 15, sec. 1, 2 Stats., 103.)

The "regulations" of the Treasury Department do not relate to this particular question, but recognize the rights of successors in trusts generally, by providing, as to "assignments by representatives and successors," that, "in case of death or successorship, the representative of the deceased person, or the successor, must furnish official evidence of such decease or successorship, and of his own appointment, authority, or power". (1 Lawrence, Compt. Dec., Appx., ch. xiii, 2d ed., p. 567.) In this case the legal representative, executor, or administrator of the deceased executor should not be permitted to administer the bonds.

Upon the principles stated, the United States would incur no liability by dealing directly with the administrator *de bonis non* with the will annexed, of William H. Tayloe, deceased, even though in equity the bonds may properly belong to a trust in favor of the three daughters of said testator. The application now made by Mr. Snyder, as executor of Edward Thornton Tayloe, deceased, must be refused, for the reasons stated.

* At common law "the administrator who is displaced, or the representatives of a deceased administrator or executor intestate, are required to account directly to the persons beneficially interested in the estate, distributees, next of kin, or creditors.

* * * An administrator *de bonis non* cannot sue the former administrator or his representatives for a devastavit." (*Beall v. New Mexico*, 16 Wall., 540, 535, and cases there cited; *Neale v. Hagthorp*, 3 Bland Ch., 551; *Hagthorp v. Neale*, adm'r, 7 Gill & Johns., 13; *Blizzard*, adm'r, v. *Filler*, adm'r, 20 Ohio, 480; *Matthews*, adm'r, v. *Meek*, 23 Ohio St., 272.) See 1 Williams, Executors (6 Am. ed.) [539], n. There are statutes in many of the States which authorize such suit.

And in addition it may be said that the executive officers of the Treasury Department have not been authorized by any statute, nor have they any implied or common-law authority, to make a decision in the nature of a conclusive decree or judgment against parties having latent equities. They have express or implied authority to hear evidence to carry out and make effective the jurisdiction conferred upon them. (Rev. Stats., 184, 187.) But in this case they cannot make a final and effective determination against all parties who may have rights not apparent on the papers. The jurisdiction which is invoked is not merely executive in its nature; it is essentially equity jurisdiction, requiring the action of the chancellor. But it does not follow that the Treasury Department will now exercise the authority it has to transfer or pay the bonds in question to an administrator *de bonis non* with the will annexed, of William H. Tayloe, deceased. Assuming the facts to be as claimed, to do so might work great injustice. The proposed evidence may be received, not for the purpose claimed, but to aid the Treasury Department in deciding what should be done. If it be reasonably shown that the facts are as claimed, the proper course will be to require a judicial determination of the rights of the parties in interest. For this purpose the United States may file a bill of interpleader in equity. (Vermilye & Co. v. Adams Express Co., 21 Wall., 138.) But this course cannot now be recommended, since no reason exists why the government should incur the trouble or expense of the suit. The parties in interest should be required, as they properly may be, to have their respective rights determined by the decree of the proper court of equity. (Safford & Co.'s case, 1 Lawrence, Compt. Dec., 285; 1 Op. Att. Gen., 681, 684.) When this shall be done, the bonds in question may properly be disposed of in accordance therewith.*

* There has been much discussion upon the question whether the executor of an executor administers the personal estate trusts with which the original testator was charged. On this subject it is said in 1 Perry on Trusts, 264: "The executor of an executor * * * becomes [at common law in England] the executor and trustee of his testator's testator. This is the rule in England, *where an executor comes into possession of all the assets in the hands of his testator, in whatever capacity such testator held them*; and, by accepting the duty of administering the estate of his immediate testator, he accepts the duty of administering all the trusts with which the assets in his testator's hands were charged. This is *probably* the rule in the United States, modified [in some States] by our probate statutes. An executor must administer and account for all the assets that come to his hands. If his testator [1] held goods of a previous testator unadministered, or [2] if his testator held assets as a trustee, probate courts may [1] appoint an administrator with will annexed of the first testator, or [2] a new trustee; and it will be the duty of the executor of the last testator [1] to settle an account with the administrator with the will annexed, or [2] with the *new trustee*, and to pay over to them the assets that came to his hands. *Until such proceedings are had*, he will hold such assets upon the same terms and trusts that his testator held them; and it will be his duty to administer them accordingly." (See 1 Williams, Exr's, 6 Am. ed. [254]. 2 *Id.* [959]; Com. Dig., tit. "Administration," B and G; Wentw., Off. Ex. 14th ed. ch. 20, 461; Bro. Administrator, pl., 7; 2 Blackst. Com., 506; Bond-Trust Case, 2 Lawrence, Compt. Dec., 291; 1 Perry on Trusts, 264, 340, 341, 343, 344. In notes to the latter many cases are cited.) It would thus seem from what is said by Perry that in England the executor of an executor is charged with the duty (1) of administering the

If the bonds are assets of the estate of William H. Tayloe, deceased,

goods unadministered by the previous testator, unless an administrator *de bonis non* with the will annexed be appointed; and (2) of executing the trusts with which such testator was charged, unless a new trustee be appointed, because in England "an executor comes into possession of all the assets in the hand of his testator, in whatever capacity such testator held them," whether (1) as executor, or (2) as general or special trustee, (1 Perry on Trusts, 264.) But the same reason does not always exist, and probably not generally in the American States. If so, it would seem more in accordance with sound policy to adopt the practice which Perry shows to be allowable, to wit: (1) as to goods and credits—including United States bonds—which remain unadministered, to appoint an administrator *de bonis non* with the will annexed (*Beall v. New Mexico*, 16 Wall., 541); and (2) as to goods and bonds held by a trustee, to cause, after his death, a "new trustee" to be appointed.

The common-law rule has been recognized in some States, and has been changed by statute in many, if not most of them. (For *New York*, see *Hawley v. Ross*, 7 Paige, Ch., 103; *Wood v. Mather*, 38 Barb., 473; *Dakin v. Demming*, 6 Paige Ch., 95; *Montrose v. Wheeler*, 4 Lans., 99.) The executor of a trustee takes, not as executor, but as trustee. (Willis on Trusts, 53 n., 111; Mat. on Exn., 100, 119, 245; 1 Johns., Ch., 119; 10 Johns., 63; *Dias v. Brunell's Extr.*, 24 Wend., 9.) By the New York Revised Statutes, part 2, sec. 17, p. 71, the executor of an executor is not authorized to administer on the estate of the first testator. (*Volgen v. Yates*, 3 Barb. Ch., 293; s. c., 9 N. Y., 219. And see 1 Williams, Executors, 6 Am. ed. [254], note b.)

It is sometimes difficult to determine as to when an executor is required to act as such, and when as special trustee; "while the executor is engaged in administering any and all the trusts created by the will, it must be presumed that he is acting in the capacity of executor alone, unless it plainly appears that such was not the intention." (*Mathews, adm'r, v. Meek*, 23 Ohio St., 289; *Gandolfo v. Walker*, 15 Ohio St., 251.) An administrator of an administrator is not the administrator of the first intestate. (2 Williams, Ex'rs., [959], note, citing *Ray v. Doughty*, 4 Blackfd., 115; *Henderson v. Winchester*, 31 Miss., 290; *Davis v. Yerby*, 1 Sm. & M., 508; *Steen v. Steen*, 25 Miss., 513.) Nor is he the successor in a testamentary trust. (*Ingle v. Jones*, 9 Wall., 486.) The executor of an administrator cannot be charged as the representative of the original intestate. (2 Williams, Ex'rs [959], note; *Arline v. Miller*, 22 Ga., 330.) The administrator of an executor does not represent the first testator, but an administrator *de bonis non* of the original testator must be appointed. (1 Williams, Ex'rs [6 Am. ed.], [254], 293; Com. Dig., tit. "Administration," B. 6, G.; Touchst., 464; Wentw. Off. Ex., 14th ed., 461; Bro. Administrator, pl. 7, 2 Blackst Com., 506.) In the notes to these works numerous cases are cited. It may be stated as a general rule, then, that upon the death of an executor the administrator *de bonis non* with the will annexed will be regarded as having sole authority in respect of bonds unadministered of the estate of first testator; that upon the death of an administrator bonds of the decedent unadministered will be controlled by the administrator *de bonis non*; and that when a testator or decedent was charged with a personal estate trust, it must be administered by the proper successor in the trust, duly appointed. But when it is shown that in any State the old common-law rule prevails, giving control otherwise, it will generally be recognized and enforced as to bonds of testators, decedents, and trustees domiciled in such State.

When by will an executor is invested with a power coupled with an interest, his executor may execute the power. (Wentw. Off. Ex., ch. 20, p. 462; 2 Williams, Ex'rs [959]; *Style v. Tomson*, Dyer, 210, a.) "But where, by a will [or otherwise], a special trust [relating to land] is recommended to an executor, as to sell land, this not performed in his lifetime shall not be performable by his executor," but by a trustee appointed in pursuance of special authority, or by a court of equity. (Wentw. Off. Ex., ch. 20, p. 462; 2 Williams, Ex'rs [959]; 1 *ib.* [276], [282] *Bond-Trust Case*, 2 Lawrence, Compt. Dec., 201.)

they cannot properly be transferred to legatees under his last will until the rights of creditors of the estate are satisfied. (2 Williams, Executors, 6th Am. ed. [1339], 1447; Evans v. Iglehart, 6 Gill & Johns., Md., 171.) But the government may not be required to perform the difficult, if not impossible, task of looking to this question of fact. (2 Perry on Trusts, 809; Watts v. Kancie, Toth. Ch., 77, 161; Ewer v. Corbet, 2 P. Wms., 148; Burting v. Stonard, *Id.*, 150; Humble v. Bill, 2 Vern., 444; 1 Bro. P. C., 71; Andrew v. Wrigley, 4 Bro. Ch., 137; McLeod v. Drummond, 17 Ves., 160; Bonney v. Ridgard, 1 Cox, 147; Keane v. Robarts, 4 Mad., 356.) If it should be determined by a decree of the proper court that the bonds are a trust fund for the benefit of the three daughters of John Tayloe, the proper course will be to ask for the appointment by the court of equity of a trustee or trustees to manage it, rather than to permit the executor of an executor to administer it, since the original will has not constituted the executor of the executor a trustee.

The applicant will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office. July 17, 1882.

IN THE MATTER OF THE AUTHORITY OF THE COMMISSIONERS OF THE DISTRICT OF COLUMBIA TO MAKE CONTRACTS FOR SUPPLIES PRIOR TO THE PASSAGE OF AN APPROPRIATION ACT AUTHORIZING SUCH CONTRACTS AND PROVIDING FOR THEIR PAYMENT.—DISTRICT CONTRACTS CASE.

1. The Commissioners of the District of Columbia cannot lawfully make any contract for supplies for the use of the District for any fiscal year until the proper appropriation act providing for payment thereof is passed by Congress.

July 19, 1882, the Commissioners of the District of Columbia addressed a letter to the First Comptroller, asking his opinion on the question whether certain contracts made by them prior to July 1, 1882, for articles to be furnished during the fiscal year ending June 30, 1883, for the use of the District, are valid. The act making appropriations for the expenses of the District for the current fiscal year was not passed until July 1, 1882.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Section 3 of the act of June 11, 1878, providing a permanent form of government for the District of Columbia (20 Stats., 103), declares that the Commissioners "shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and

shall be approved by Congress.” The act does not state what contracts the Commissioners may make or what obligations they may incur, but it provides that they shall submit annual estimates to the Secretary of the Treasury, and, after these have been acted upon by the Secretary, that the estimates shall be transmitted to Congress. It is also enacted in the same section that “to the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District other than the property of the United States and of the District of Columbia; * * *.” The clause which prohibits the Commissioners from making any contract, or incurring any obligation other than such as are hereinafter provided for in this statute, and as shall be approved by Congress, means, therefore, that they shall not make any contract or incur any obligation other than such as may be authorized under the appropriation acts passed by Congress, or by some other statute. The act of July 1, 1882, making the appropriations for the District of Columbia for the fiscal year ending June 30, 1883, gives, in effect, authority to the Commissioners to make contracts and to incur obligations payable out of the appropriations therein made. Until an appropriation act has been passed, the extent to which the estimates submitted to Congress will be approved cannot be known, nor what specific expenditures will be authorized.

Section 3732 of the Revised Statutes of the United States enacts that, “No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, * * *.” This section applies to the class of contracts referred to by the Commissioners, because to a certain extent contracts for supplies for the District of Columbia are entered into on behalf of the United States. But the same result would follow, even without reference to this section.

The Commissioners of the District had no authority prior to the passage of the appropriation act to make the contracts referred to, and therefore said contracts are invalid. The parties with whom the contracts have been entered into will, no doubt, when notified that they are invalid, enter into new contracts on the original terms, and thus no injury will result to them or to the District. This form of ratification or renewal of contract is a subject intrusted to the discretion and judgment of the Commissioners.

The Commissioners will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, July 22, 1882.

IN THE MATTER OF THE RIGHT OF THE HOLDER OF ONE-HALF OF A
MATURED UNITED STATES COUPON BOND TO PAYMENT THEREOF.—
BARNETT'S CASE.

1. Statement of the provisions made for the payment of United States bonds, and the mode of payment.
2. The Treasury Department regulations relative to the redemption of fractional parts of United States notes (greenbacks) do not apply to United States bonds.
3. When a right arises under a statute, and a special statutory remedy for such right is prescribed in the same statute to be exercised by the accounting officers of the Treasury Department, such officers cannot give a remedy in any other form, or in any other cases, than as thus prescribed.
4. There may be, also, a judicial remedy afforded by statute in cases thus provided for, or in cases as to which no remedy can be afforded by accounting officers.
5. No provision is made by which the Treasury Department can pay a matured coupon bond of the United States on presentation of a part thereof unless evidence of the destruction of the other part be submitted.
6. Cases cited as to the effect of assignments in blank of registered bonds.

W. H. Barnett, of New Orleans, in a letter dated October 1, 1881, transmitted to the Treasury Department for redemption one-half (the right-hand end) of a five-per-cent. United States coupon bond, No. 1302, for \$50, issued under the act of July 14, 1870, alleging that he purchased it from a party who represented that the other half was lost; but the loss is not established by evidence. It is not alleged that the missing half was destroyed. The bond is past due, having matured on the 12th day of August, 1881, on which day all outstanding bonds issued under said act of July 14, 1870, and under the act of January 20, 1871, were called—per 103d Call—for payment “at the Treasury of the United States, in the City of Washington, D. C.,” and has been “called” for payment. It is not shown whether the transmitted portion of the bond was purchased by claimant prior to or after the maturity of the bond. November 15, 1881, the papers were referred to the First Comptroller for his opinion on the question as to whether this half of the bond can be paid.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The statutes authorize the Secretary of the Treasury to redeem bonds of the United States, and appropriate money for that purpose. (Rev. Stats., 3688, 3693, 3697, 3700, 3702; act July 14, 1870, sec. 3, 16 Stats., 272; act March 3, 1881, sec. 2, 21 Stats., 435.) In practice, payment of matured bonds is made by the Treasurer of the United States as a disbursing officer, without the formality of a Treasury warrant (1 Lawrence, Compt. Dec., Appx., ch. xiv, p. 589; Police Case, *Id.*, 71-74; Ashton's Case, *Id.*, 167; Rev. Stats., 301, 305, 306, 309, 310, 311, 3691, 3698), and his accounts therefore are audited by the First Auditor, who certifies them to the First Comptroller for his revision and certificate thereon. (Rev. Stats., 269, 277, 305, 311.) Hence arises the jurisdiction

of the First Comptroller for an opinion by him upon the question—What payment, if any, should be made for the fractional part of the bond now in question?

The regulations of the Treasury Department made in pursuance of law (Rev. Stats., 161, 3574) determine the liability of the United States, and prescribe the mode of paying parts of United States notes, greenbacks (Rev. Stats., 3571 *et seq.*), silver certificates (act of February 28, 1878, sec. 3, 20 Stats., 25), and fractional currency (Rev. Stats., 3572, *et seq.*); (Lost-Greenback Case, *ante*, p. 166.) Under these regulations certain fractional parts of notes, &c., may be paid on presentation; but they do not apply to government bonds. The Secretary of the Treasury is authorized to make regulations not inconsistent with law with reference to the redemption of United States bonds. (Rev. Stats., 161, 3702; acts of June 22, 1860, sec. 2, 12 Stats., 79; February 8, 1861, sec. 2, 12 Stats., 129; March 2, 1861, sec. 2, 12 Stats., 178; July 17, 1861, secs. 3 and 5, 12 Stats., 259), and he has done so. (1 Lawrence, Compt. Dec., 2d ed., Appx., ch. xiii, p. 560.)

The several statutes authorizing the issue of government bonds, fixing the rights of holders thereof, and prescribing the mode of redemption or payment, all belong to one system; they are *in pari materia*, and, hence, upon well-settled principles, are to be construed together as one statute. These bonds are creations of the statute, and are not of common-law origin. It is well settled that where a right arises under a statute, and a special statutory remedy for such right is prescribed in such statute to be given by accounting officers, this remedy only can be pursued before these officers. (United States *v.* Lyman, 1 Mass. C. C., 500; Farmers', &c., National Bank *v.* Dearing, 91 U. S., 35; Barnett *v.* National Bank, 98 U. S., 558; State *ex rel.* Grisell *v.* Marlow, 15 Ohio St., 134; Sedgwick on Construction Stat. and Const. L., 76, 341, *note a*; Smith *r.* Lockwood, 13 Barb., 209; Dudley *r.* Mayhew, 3 Const., 9.) With this principle in view, the inquiry arises—What is the remedy furnished by the statute to the claimant in this case? The statute declares that “all bonds applied to the sinking-fund, and all other United States bonds redeemed or paid by the United States, shall be canceled and destroyed” and that “A detailed record of the bonds so canceled and destroyed shall be first made in the books of the Treasury Department.” (Rev. Stats., 3695.)

1. This declaration, standing alone, authorizes the payment of such bonds only as are presented substantially entire. By this, of course, is only meant that the material obligatory part of the bond must be produced in cases where by accident other portions of it are lost. The statute contemplates the presentation of the entire bond, because without this the bond could not be “canceled,” nor could a “detailed record” of it be made. This requirement of the statute is supported by considerations of public policy. If one half of a coupon bond could be redeemed as a whole bond, without evidence of the destruction of the other half,

a door would be opened for fraud on the government, and on purchasers of the separate halves of a bond. If payment should be made of one-half, why not permit bonds to be cut up and sold out in quarters? It cannot be supposed that Congress intended to permit such practice as this. The Treasury Department has never recognized the right to payment of a fractional part of a bond under the circumstances of the claim now made.

It does not distinctly appear whether the purchase by the claimant of the fractional part of the bond in question was designed as a purchase of the entire sum owing on the whole bond, or of a part only. The whole bond is payable to bearer. The claimant is not the bearer or holder of the whole bond. The law has not authorized a purchase of fractional portions of a bond by a division of the bond itself. If the holder of an entire bond might sell an *equitable* right to one-half its proceeds, no provision has been made by which accounting officers can determine the extent of such interest or make payment of parts to sundry claimants.*

* The "regulations" of the Treasury Department authorize the assignment of a part interest in bonds *not due*, for reissue as follows (1 Lawrence, Compt. Dec., 2d ed., Appx., ch. xiii, p. 566):

"The directions printed on the backs of the bonds should be carefully followed in the execution of assignments, and all the blank spaces filled in properly. The name of the assignee should be written plainly in the space left for that purpose.

"If a bond is to be divided among two or more parties, their names and the amount to each should be stated in the assignment. If only a part of a bond is assigned, a new issue for the remainder will be made to the former payee of the whole bond: *Provided*, however, That the amount assigned shall correspond with one or more of the denominations in which the bonds are issued.

"Registered bonds should not be assigned in blank, as such assignment would make them payable to bearer and render them available to any holder thereof; in other words, under an assignment in blank the title to the bonds would pass by delivery.

"A detached assignment should never be resorted to, except when the blank form for an assignment which is printed on the bond shall have been already used: and in this case only when there shall not be sufficient space on the back of the bond for another assignment."

In relation to the assignment of registered bonds in blank, it seems to have been held in some cases that, where a certificate of public debt is made transferable only by the holder, or his legal attorney or representative, on the books of the stock commissioner, a *blank indorsement gives no authority to an agent to assign it, even for value.* (Combs v. Hodge, 21 How., 397, 406. See also Baldwin v. Ely, 9 How., 580; Sewall v. Boston Water Power Co., 4 Allen, 282; 2 Perry on Trusts, 814 n; Enthoven v. Hoyle, 76 Eng. C. L., 394; White v. Vermont, &c., R. R. Co., 21 How., 575; Burroughs, Public Securities, 139, 140, 254; Angell & Ames, Corporations, 564, 566, 576; 16 American Law Review, 606, Boston, August, 1882).

The authorities on this subject are conflicting. Some recognize the validity of blank assignments made in good faith. (Drury v. Foster, 2 Wall., 33; Jones, Railroad Securities, 204; United States v. Nelson, 2 Brock, C. C. R. 64; Speake v. United States, 9 Cranch, 28; White v. Vt. & Mass. R. R. Co., 21 How., 575; Chapin v. Vt. & Mass. R. R. Co., 8 Gray, 575; Dutchess Co. Ins. Co. v. Hachfield, 1 Hun., N. Y., 675; s. c., 47 How. Pr., 330; Michigan Bank v. Eldred, 9 Wall., 544; Bridgeport Bank v. New York, &c., R. R. Co., 30 Conn., 231; Stahl v. Berger, 10 Serg. & R., 170; Sigfried v. Levan, 6 Id., 308; Wiley v. Moor, 17 Id., 438; Woolley v. Constant, 4 Johns., 60; *Ex parte* Kerwin, 8 Cowen 118; Boardman v. Gore, 1 Stewart, 517; Eagleton v. Gutteridge, 11 Mees. & Welsb., 465; Earl of Falmouth v. Roberts, 9 M. & W., 471; Davidson v.

2. The statute has prescribed the cases in which a bond may be paid in full on the presentation of a part thereof. When any coupon or registered

Cooper, 11 M. & W., 793; Van Amringe v. Morton, 4 Whart., 382; and see cases collected 2 Parsons, Cont., 6th ed., 723, *note*.)

Others, in principle, hold a different view (Hibblewhite v. McMorine, 6 M. & W. Exch., 200; Enthoven v. Hoyle, 13 C. B., 373; Boyd v. Boyd, 2 N. & M., 125; Gilbert v. Anthony, 1 Yerg., 69; Byers v. McClanahan, 6 Gill. & L., 250; Ayres v. Harness, 1 Ohio, 368; McKee v. Hicks, 2 Dev., 379; Harrison v. Tiernans, 4 Rand., 177.) Some of these cases relate to deeds, and deny the validity of such an instrument if executed in blank and afterwards filled in. This rests on the principle that a sealed instrument requires a sealed authority to make or change it. But many cases hold that the character of municipal and corporate bonds is not affected by the addition of a seal. (Jones, Railroad Securities, 198, *note*; White v. Vt. & Mass. R. R. Co., 21 How., 575.)

The result would, on principle, seem to be that the legal title of corporate or municipal bonds originally made to a blank payee passes to the party whose name is filled therein; but that the *legal title* of registered bonds transferable only on designated books, and corporate certificates of stock transferable in the same manner, can only pass in the prescribed mode. But *equitable* interests may pass by any mode indicating such to be the intent of the parties to the transaction, as by a blank assignment and delivery upon a sufficient consideration. (Combs v. Hodge, 21 How., 400; citing Turton v. Benson, 1 P. Wms., 496; s. c., 2 Vernon, 764; Davies v. Austen, 1 Ves., jr., 247; and see the cases collected in the note [Perkins ed.], 1 Bro. Ch., 434; Cator v. Burke, and 3 Bro. Ch., 179; Scott v. Shreeve, 12 Wheat., 605; Judson v. Corcoran, 17 How., 612.)

In the latter case the accounting officers of the Treasury Department would generally require adverse claimants to settle their rights by decree of a court of equity. (Gibson's Case, *post*.) A blank assignment may in some cases operate by way of estoppel. (Swain v. Seamans, 9 Wall., 273; Stowe v. United States, 19 Wall., 16; Herman, Estoppel, 330; Gibson's Case, *post*.)

A question may arise as to the validity at law of blank assignments under what is said in the regulations. In proper cases "regulations" have the force of law. The loan acts require registered bonds to be "transferred on the books of the Treasury under such regulations as may be established by the Secretary of the Treasury." (Loan Acts of June 22, 1860, sec. 2, 12 Stats., 79; February 8, 1861, sec. 2, *Id.*, 129; March 2, 1861, sec. 2, *Id.*, 178; July 17, 1861, secs. 3 and 5, *Id.*, 259; July 14, 1870, 16 Stats., 272; January 20, 1871, *Id.*, 399.) The proper assignment by the payee, on the bond or on a separate paper, with the requisite certificate of acknowledgment of assignment, of the proof of facts which make an assignment by operation of law in certain cases, is the authority to make a transfer "on the books of the Treasury" Department.

"The directions printed on the backs of the bonds," mentioned in the "regulations," are shown by the following specimen:

"FOUR PER CENT CONSOLS.

"1877-1907.

"For value received — assign to — the within registered bond of the United States, and hereby authorize the transfer thereof on the books of the Treasury Department.

" — — — — —.

"Dated —, 18—.

"STATE OF —,

"Town of —, County of —:

"Personally appeared before me the above-named assignor, known or proved to me to be the — payee of the within bond, and signed the above transfer, acknowledging the same to be his free act or deed.

"Witness my hand, official designation, and seal.

" — — — — —. [SEAL.]

"NOTE.—The execution and acknowledgment of the above assignment, when not made at the Treasury Department, must be before a U. S. judge, U. S. district at-

bond has been *destroyed wholly, or in part*, it may, on proper evidence, be paid; so a lost registered bond may be paid on proper evidence.* Upon

torney, clerk of a U. S. court, collector of customs, collector or assessor of internal revenue, U. S. Treasurer or assistant treasurer, or the president or cashier of a national bank, or if in a foreign country, before a U. S. minister or consul. In all cases the officer must add his official designation, residence and seal if he has one. When the assignment is made by a corporation, it must be named as the assignor, when by a guardian, trustee executor, administrator, an officer of a corporation or any one in a representative capacity, proof of his authority to act must be produced to the officer before whom the assignment is made, and must accompany the bond. Assignors must be identified as known and responsible persons to the satisfaction of the officer."

The loan acts authorize two classes of bonds: coupon, payable by delivery to bearer, and registered, in which the obligation of the United States is to pay the party therein named "or assigns." (Sallu's Case, 1 Lawrence, Compt. Dec., 215, 218.) An assignment in blank does not name a party as assignee; and, if the blank assignment could authorize the first purchaser under it to insert his name as assignee, the question remains whether it could authorize another and subsequent purchaser to insert his name, or whether this is against the letter or policy of the statutes. Such purchaser might be the equitable owner. (Baldwin v. Ely, 9 How., 601; Williamson v. Thomson, 16 Ves., 443; Burroughs, Public Securities, 252; Angell & Ames, Corp., §§ 564, 565, 566; Field v. Pierce, 102 Mass., 261; Bank v. Lanier, 11 Wall., 377.) If the last of several successive holders of a bond thus assigned in blank should have procured it without right thereto, and should fill in his name without the knowledge of the Secretary of the Treasury, and then at maturity assign it to the Secretary for payment, all appearing regular, the payment thereof would, by way of estoppel, defeat the claim of any former holder against the government. (Johnson v. Lafin, 5 Dillou, C. C. R. 76; s. c., 103 U. S., 800; Webster v. Upton, 91 U. S., 70; 3 De Gex & Smale, Ch., 310; Angell & Ames, Corp., 564, 565, 566, 576.) So an assignment made under similar circumstances before the maturity of a bond to a *bond fide* purchaser, and a transfer entered in the Register's office, would give him a title which no former holder could controvert. (Cavanaugh's Money Securities, 266; Burroughs, Public Securities, 138, 254; Imperial Land Company of Marseilles, L. R., 11 Eq., 478; *Ex parte* Colboone, L. R., 11 Eq., 490; Bank v. Lanier, 11 Wall., 374; Baldwin v. Ely, 9 How., 600; De Voss v. City of Richmond, 18 Gratt., 338; Knox, Conors & Co. v. Aspinwall, 21 How., 539; Supervisors v. Schenck, 5 Wall., 772; Royal Brit. Bk. v. Turquand, 85 Eng. C. L., 248; Angell & Ames, Corp., § 576; Johnston v. Lafin, 103 U. S., 800; s. c., 5 Dillou, C. C. R., 65.) This results from the doctrine of estoppel that "a man shall not defeat his own act or deny its validity to the prejudice of another." This is well illustrated in the case of an invalid power of attorney, executed in blank. (Stowe v. United States, 19 Wall., 16; Herman, Law of Estoppel, sec. 212; Swain v. Seamana, 9 Wall., 273; Bronson's Extr. v. Chappell, 12 Wall., 681; New England Car-Spring Co. v. Union India-Rubber Co., 4 Blatchf. C. C., 1; Alvord v. United States, 8 Ct. Cls., 364.) It equally results from the principle, that where one of two innocent parties must suffer a loss, it shall fall on him through whose act it occurred. These principles apply where the payee in a bond executed a blank assignment for the purpose of making a sale. But a mere indorsement in blank, not designed to operate as a sale, and without the requisite certificate of acknowledgment of assignment required by "regulations," would not estop the payee from asserting his equities even in the hands of *bond fide* holders. (Combs v. Hodge, 21 How., 406; Bank v. Lanier, 11 Wall., 374; Gibson's Case, *post*; Angell & Ames, Corp., § 576; Marlborough Mfg. Co. v. Smith, 2 Conn., 579; Northrop v. Newtown, &c., T. Co., 3 Conn., 544; Fisher v. Essex Bank, 5 Gray, 373; Shipman v. Aetna Ins. Co., 29 Conn., 245.)

* The provisions will be found in sections 3702, 3703, 3704, 3705 of the Revised Statutes, and the regulations in relation thereto in 1 Lawrence, Compt. Dec., Appx., ch. xiii, p. 560.

the rule of construction already stated, the *cases thus provided for* must be deemed the only cases in which payment can be made by the Treasury Department of a bond on presentation of a part thereof. The claimant has not shown such a case.

3. In holding that executive *accounting officers* can only allow a credit to the Treasurer when he pays government bonds in *the cases specified*, and in the *mode pointed out* by the statute under which action is taken, it is not intended to say that there may not be a remedy in the Court of Claims in proper cases. That is a subject for judicial action. (Rev. Stats., 1059; 2 Daniel, Neg. Ins., 1695.)

The application for payment should be refused.

TREASURY DEPARTMENT,

First Comptroller's Office, July 15, 1882.

IN THE MATTER OF THE RIGHT TO SET-OFF MONEYS LEGALLY DUE A CLAIMANT AGAINST A BALANCE IMPROPERLY CERTIFIED IN A SETTLED ACCOUNT—SANBORN'S CASE.

1. The mode and practice of the Treasury Department stated, by which contracts were made with persons to assist the proper officers of the government in discovering and collecting money belonging to the United States when the same was withheld by any person or corporation. (Act of May 8, 1872, 17 Stats., 69.)
2. When it is proposed to make a set-off under the act of March 3, 1875 (18 Stats., 481), the first question to be determined in the Treasury Department is whether there is such evidence of indebtedness as requires the Secretary of the Treasury, in the exercise of a reasonable and prudent discretion, to have it tested by "legal proceedings" in the courts, and not whether the party against whom the set-off is to be made is certainly indebted to the United States.
3. When, under proper construction of a statute, there is no authority for the making of a contract by an executive officer, his erroneous construction of it cannot authorize a valid contract. Hence, the act of May 8, 1872 (17 Stats., 69), which authorized the Secretary of the Treasury to make contracts with informers and to compensate them out of the money "belonging to the United States" which may be collected by their agency, did not authorize a contract for such service, in respect of money supposed, at the time of making the contract, to be payable to the United States as a legacy tax, and which was afterwards determined by the Supreme Court not to be payable to the United States. In such case the contract is void. Payment of moities to informers in internal-revenue cases was prohibited by act of June 6, 1872, sec. 39 (17 Stats., 256).
4. When a person employed under the act of May 8, 1872, has secured the payment to the United States of a legacy tax, which was supposed to have been lawfully payable, under the construction then given by the executive officers to the internal revenue law, but which was afterwards determined in the Supreme Court not to be payable under a proper construction of the law, and one-half of the amount so collected has been paid to the employé for his services, under a contract which purported to give him a right to such moiety for "collecting any money belonging to the United States," the government, when making a claim against its employé for a refund of the money so paid to him, is not estopped from denying the legality of the payment made to him by the Department of the Treasury.

5. Such a payment by the Secretary of the Treasury to the employé is not a voluntary payment, in contemplation of law, and an action will lie for the recovery of the money from the employé.
6. In such case the employé is estopped from denying that the money illegally collected by the government belongs to it.
7. The title to money collected by the government under color of law, though illegally collected and paid into the Treasury, vests in the United States, and it cannot be divested without legal proceedings in a court of competent jurisdiction.
8. The Treasury Department practice stated, by which a set-off is enforced under the act of March 3, 1875 (18 Stats., 481).
9. When a public officer has, without lawful authority, paid money of the United States to a person under color of legal claim but without legal authority to receive it, it may be recovered from such person. The doctrine of estoppel has no application in such case.

General John E. Wool, residing in the fifteenth New York internal revenue collection district, died in 1869, leaving a will, by which after the death of his wife, sundry legacies were to be paid to persons named. By law the taxes on legacies became due only when the legatee became entitled to the possession of the legacy. (See act June 30, 1864, secs. 124, 125, 13 Stats., 285, 286, as amended by the act of July 13, 1866, sec. 9, 14 Stats., 140; *Mason v. Sargent*, 104 U. S., 689.) Mrs. Wool, his widow, died May 8, 1873.

October 30, 1872, a contract was made between the Secretary of the Treasury and John D. Sanborn, under the act of May 8, 1872 (17 Stats., 68, 69; see House Ex. Doc. No. 132, first session, Forty-third Congress, pp. 16, 19, 21, 75, 151, 275), by which said Sanborn agreed, for a consideration of one-half the sum to be recovered, to proceed to collect, among others, the tax on said legacies. This contract was entered into under the construction then given to the law that the legacy tax was due and payable before the death of Mrs. Wool. The contract recites an affidavit previously made by Sanborn and filed with the Secretary, stating that this legacy tax was then due and unpaid.

In June or July, 1873, soon after the death of Mrs. Wool, the proper internal-revenue collector demanded of the executor of Wool a return for assessment of the legacy tax, and was proceeding to take steps to collect the tax, without the knowledge of any payment to Sanborn. August 2, 1873, the executor informed the collector that he had paid the taxes [by his check to the order of the Secretary of the Treasury].

August 3, 1873, Sanborn reported to the Secretary of the Treasury that the executor of Wool had paid to him [by check, as aforesaid] the legacy tax, \$14,668 [after the death of Mrs. Wool], which he remitted to the Secretary with a request that one-half the amount be paid to him. The tax was paid by draft August 1, 1873, of Asher R. Morgan, executor, on the United States Trust Company, New York, for \$14,668, transmitted by the Secretary August 9, 1873, to the Treasurer of the United States for "deposit to the special credit" of the Secretary. (House Ex. Doc. No. 132, 1st sess., 43d Congress, 151.)*

* The legacy tax was levied by the act of June 30, 1864 (13 Stats., 285), as amended by the act of July 13, 1866 (14 Stats., 140), and the tax on legacies was repealed by

May 24, 1882, the Commissioner of Internal Revenue addressed a letter to the Secretary of the Treasury, stating that said Sanborn is a claimant for rewards as informer in several internal-revenue cases under the circular of July 31, 1873. Some of these claims have been allowed by the Commissioner and approved by the Secretary under section 3463 of the Revised Statutes; and an account for the payment of the same has been settled by the Fifth Auditor, and the balance found due by the Auditor will be certified by the First Comptroller. One of them is a claim, in which the "amount due" is to be reported, under the provisions of the act of June 14, 1878 (20 Stats., 130), "to the Speaker of the House of Representatives, who shall lay the same before Congress for consideration." The Commissioner states that there is reason to believe that Sanborn is justly indebted to the United States in the sum of \$7,334 improperly paid to him; and he suggests that payment of all moneys due Sanborn, or "an amount * * * equal to the debt thus due to the United States," be withheld by the Secretary pursuant to the provisions of the act of March 3, 1875 (18 Stats., 481). It is suggested that, as the legacy tax was not due and payable until after the death of Mrs. Wool, the contract with Sanborn in respect to the case of the Wool estate was void, for the reason that it was made before the tax was due. May 27, 1882, the Secretary approved the Commissioner's recommendation, and referred the letter to the First Comptroller, "with a request that there

sec. 3 (to take effect October 1, 1870) of the act of July 14, 1870 (16 Stats., 256); but the right to recover all taxes which had accrued prior to the operation of the repeal was saved by section 17 of the act (16 Stats., 261).

The act of May 8, 1872 (17 Stats., 69), authorized the Secretary of the Treasury to employ three persons to assist the proper officers of the government in discovering and collecting moneys belonging to and withheld from the United States, and such informers were to be paid "out of the money and property so secured." In practice this was treated as an appropriation of one-half for that purpose, or perhaps rather as an authority to use the money for the purpose specified in the statute, assuming as a question of constitutional law (Const., art. 1, sec. 9, cl. 7) that, as this portion of the money was not necessarily payable into the Treasury, no formal appropriation act by Congress was required by the Constitution. There have been other statutes of similar character. (Act of June 30, 1864, 13 Stats., 239); 1 Lawrence, Compt. Dec., Appx., ch. xii, p. 535, 2d ed.; 3 Op. Att. Gen., 13; District Land Office Case, 2 Lawrence, Compt. Dec., 2d ed., 415.)

This half was not covered into the Treasury. The whole amount collected by the informer was paid to the Treasurer for the credit of the Secretary, who covered one-half into the Treasury and paid the other half to the informer. In this case the transaction was as follows: August 15, 1873, there was deposited with the United States Treasurer, to the credit of the Secretary of the Treasury, \$32,002.68. This sum was made up of several amounts collected by John D. Sanborn, among which was the amount of \$14,668, collected from the estate of the late General John E. Wool. August 16, 1873, the said amount of \$32,002.68 was disposed of by check of the Secretary, as follows: \$16,001.34 deposited in the Treasury to the credit of the United States Treasurer, and \$16,001.34 paid to John D. Sanborn. (See House Ex. Doc. No. 132, 1st Sess., 43d Congress, Part I, pp. 151-153.) The \$14,668 collected from the Wool estate was deposited to the credit of the Secretary, who deposited one-half in the Treasury and paid one-half to Sanborn.

be attached to any warrant directed to be signed for Sanborn some memorandum to call attention * * * so the law may be complied with."

George L. Douglass, counsel for Sanborn, filed a brief against withholding the money under the act of 1875:

1. It is sought to recover \$7,334 from Sanborn on the ground that the contract between him and the Secretary of the Treasury for the collection of tax from the Wool estate was entered into at a time when no tax was either due or withheld; hence, that the contract was unwarranted by law; that it could confer no rights upon Sanborn; and that moneys paid under it to him were wrongfully paid and can be recovered back.

2. Waiving the injustice and questionable legality of opening an old matter of this kind, settled many years ago by public officers having a knowledge of all the facts, one circumstance appears decisive of the issue. The Supreme Court has decided (*Mason v. Sargent*, 104 U. S., 689) that the ruling of the Revenue Office as to tax on estates in remainder was entirely wrong; and that where legatees in remainder were not entitled to possession until after October 1, 1870, the government had no claim for legacy tax. This was precisely the case of the legatees of John E. Wool. They never owed one dollar of the \$14,668 collected by Sanborn. Hence, Sanborn has no money belonging to the United States; but he and the government have, between them, \$14,668, erroneously exacted from the said legatees. So far, therefore, from Sanborn owing the government, the latter has already exactly \$7,334 more than in good conscience it has any right to keep. The Wool legatees may have a claim against Sanborn, but the United States certainly has not.

3. How can the government recover from Sanborn money to which it never had a shadow of legal or equitable right in itself? The government is now protected from all liability to the Wool estate by the statute of limitations (Rev. Stats., 3228); and Sanborn has no money which either belongs to the government or for which the government is in any way responsible.

4. It is well settled that a set-off or counterclaim can be enforced only where the defendant might have maintained a separate action against the plaintiff for the same item; and that a party must always establish his own title before he can profit by a defect in his adversary's.

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DECISION BY WILLIAM LAWRENCE, *First Comptroller* :

Under the act of March 3, 1875 (18 Stats., 481; Rev. Stats., 1866), if Sanborn is "indebted to the United States in any manner," it is the duty of the Secretary of the Treasury to withhold from him so much of the amount admitted to be due him as will pay his indebtedness to the United States; and if Sanborn assents to such arrangement, the proper discharge is to be executed; but if he denies his indebtedness, or refuses to consent to the set-off, it is made the further duty of the Secretary "to cause legal proceedings to be immediately commenced to enforce the

same." Sanborn does not consent to the set-off, and denies that he is indebted to the United States, while the government asserts that he is so indebted.

The real question now to be decided is, therefore, not whether Sanborn is absolutely and beyond dispute indebted to the United States, but whether there is such evidence of indebtedness as requires the Secretary of the Treasury, in the exercise of a reasonable and prudent discretion, to have the question of his indebtedness tested by "legal proceedings" in the courts. One of the purposes of the statute was to meet such disputed claims. Without assuming to reach conclusions beyond dispute, the considerations hereafter stated are intended to show that it is proper to retain the money, now admitted to be due Sanborn from the United States, until the controverted question of his indebtedness to the latter may be decided in a proper judicial proceeding. If Sanborn can retain the money paid to him as informer under the contract of October 30, 1872, it must be either (1) because he had a lawful right to receive it, or (2) because the government is estopped from denying the legality of the transaction, or (3) because the payment, having been voluntarily made to him, cannot, on legal principles, be reclaimed, or (4) because the government had no right to collect the money, and hence has no right to recover the moiety it paid to Sanborn.

I. The contract with Sanborn was void; therefore the payment made to him under it was unauthorized, and he had no right to receive it.

The act of May 8, 1872, authorized the Secretary of the Treasury to make contracts with persons, "to assist the proper officers of the government in discovering and collecting any money belonging to the United States" (17 Stats, 69). As there was no legacy tax due—or, as the statute says, "belonging to the United States"—from the executor of Wool when the contract with Sanborn was made, the conditions did not exist which authorized the making of any contract. It was therefore void, and could give him no claim to compensation thereunder. "Void things are as no things," and hence confer no rights. By reason of the repeal of the law levying the legacy tax, before the legacies in this case became due (act of July 14, 1870, secs. 3 and 17; 16 Stats., 256, 261), no such tax was ever due from the estate of General Wool. The money collected from the executor of General Wool's estate, as and for legacy tax, was illegally collected. Adjudicated cases, which show (1) that the United States can only act by its authorized agents, (2) that a contract made by officers of the United States without authority is void, (3) that persons with whom such a contract is made are bound at their peril to ascertain the authority of the officers, and (4) that such void contract can give no rights even to parties rendering service under it, have been cited elsewhere, and it is unnecessary here to repeat them. (*Exigency Case*, *ante*, 92; *Contract Assignment Case*, 2 Lawrence, Compt. Dec., 2d ed., 472.)

II. The government is not estopped from denying the legality of the payment to Sanborn. An estoppel arises when a party "has done some

act which the policy of the law will not permit him to gainsay or deny." (1 Greenl. Ev., § 22.) "The Government of the United States is not ordinarily bound by an estoppel." (Herman, Estoppel, § 219; Johnson v. United States, 5 Mason, C. C., 425; United States v. Collier, 3 Blatchf., C. C., 325; Cook v. United States, 12 *Id.*, 43, 61; Fenemore v. United States, 3 Dallas, 363.) But, assuming that there may be cases in which the United States may be estopped by the acts of its officers, the estoppel can only occur upon authorized acts, or acts ratified by competent authority. When a party, "by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position," it would be bad faith to deny the truth of such words, or the existence of the facts inferable from such conduct. (Herman, Estoppel, § 4.) If a transaction similar in principle to that now in question had occurred between natural persons, the employer would not be estopped from denying the legality of the payment, made, as it was, on the faith of an erroneous representation by the claimant, which induced the making of the contract. But even though estoppel would lie in such case, the same result would not follow here, because the United States spoke no words and, in contemplation of law, did no act on the faith of which Sanborn rendered services. The Secretary of the Treasury, mistaking his power and authority, by his words and conduct induced Sanborn to render the services, but the Secretary's words and conduct were not those of the United States. They were unauthorized, and could not bind or commit the government to any duty or obligation. Words spoken by public officers without authority are as no words; contracts made by them without authority are as nothing. The government cannot be estopped from denying the words or acts of its officer when such officer is unauthorized to speak or act in its behalf. (Exigency Case, *ante*, 92.)

III. There has been no voluntary payment by the United States to Sanborn which can defeat an action to recover from him the money he received. The United States never assented to the payment. No officer had authority to make or assent to such payment.

IV. The government has a right to the money in question. It is sufficient for this case to show (1) that Sanborn is estopped from denying that the money paid him was money "belonging to the United States," and (2) that, having received it without authority or any right thereto, he may be required to refund it.

The executor of General Wool paid the money out of which the controversy arises as and for taxes due to the United States. It was received by the United States as and for money "belonging to the United States." The check by which the executor paid it was made payable, either originally or by indorsement, to the Secretary of the Treasury for the United States. It was transmitted by Sanborn to the Secretary as and for money "belonging to the United States." As the money was collected by the government under color of legal authority, the

legal title thereto vested in the United States, and that title cannot now be divested except by the judgment of a court of competent jurisdiction. The fact that the money was improperly and illegally collected does not change this result. Sanborn received from the United States for his services one-half of the money collected. He derived from the United States such title as he has to the money he received. By receiving the money from the government he admitted and affirmed a title thereto in the United States. He is a *privy in estate* with the United States, with full knowledge; and in all questions arising between the United States and himself he cannot deny that the United States had a legal title to the money. (1 Greenl. Ev., §§ 23, 189, 190, 211; Herman, Estoppel, §§ 212, 219, 237, 320, 331, 354; Gaines v. New Orleans, 6 Wall., 642.) "Parties who claim under or by virtue of the same right shall not dispute the title or enter into a controversy as to its merits." (Herman, Estoppel, § 354.)

Sanborn having received the money without any right thereto, and without any lawful authority in any officer to pay it to him, is in law bound to refund it. "Where the money of the government is improperly [unlawfully] placed in a bank, the illegality of the transaction is no bar to a recovery" by the United States. (United States v. City Bank, 6 McL., C. C., 130; United States v. Buford, 3 Pet., 12.) "Money paid under a certificate from persons not authorized by law to give it might be recovered back by the United States." (United States v. Ferreira, 13 How., 52, note; Fenemore v. United States, 3 Dall., 357; United States v. Inhabitants of Waterborough, Daveis, Dist. Maine, 154; United States v. Bartlett, *Id.*, 9; Adams v. United States, 1 Ct. Cls., 192, 306; McElrath v. United States, 12 *Id.*, 201; Shelley's Case, *post*.)

There are cases in which a voluntary payment, made under a mistake of law and without protest, cannot be recovered back. (Elliott v. Swartwout, 10 Pet., 137; Maxwell v. Griswold, 10 How., 242; Railroad Company v. Commissioners, 98 U. S., 541; Sturges v. United States, Dev. Ct. Cls., 20; Schlesinger v. United States, 1 Ct. Cls., 16; Hall v. United States, 9 *Id.*, 270; De Bow v. United States, 11 *Id.*, 672; White v. United States, *Id.*, 578.) But the payment made to Sanborn was not a voluntary payment by the United States. It was merely the unauthorized act of an officer.

As between the United States and the executor of Wool the latter had a right, within two years from the time he made payment, to reclaim the money. (Act July 13, 1866, sec. 9, 14 Stats., 111; act June 6, 1872, sec. 44, 17 Stats., 257; act December 24, 1872, secs. 1 and 2, 17 Stats. 401, 402; Rev. Stats., 3220, 3228.) It is unnecessary to inquire as to other remedies. (Rev. Stats., 989; Dunnegan's Case, 2 Lawrence, Compt. Dec., 2d ed., 104.) If, during the time the executor had a right so to reclaim it, he had pursued his remedy, Sanborn could not, upon any legal or just ground, have claimed a right to retain the amount he

received. It is to be presumed that the government will do justice to the estate of Wool, even though there be no means of compelling it by suit. Sanborn cannot deny the right of the government to do so, and hence he is in no position to insist upon retaining any part of the fund which, in justice and equity, should be paid back to the estate. The legal duty and liability of Sanborn are the same, whether the government refunds to the estate of Wool or not. His duty and liability are not lessened, whether the government discharges its duty and obligations or not. The question which now arises is one between the United States and Sanborn alone. As between these parties, the government is entitled to the money, because it had a title thereto under color of law, which, perhaps, became absolute by the voluntary payment and the failure of the executor to reclaim "within two years next after the cause of action accrued"; at all events, Sanborn has no right to retain any portion of the moneys, because no officer had authority to pay it to him.

The contract with Sanborn was made under the provisions of the act of May 8, 1872 (17 Stats., 69). Under this contract he was allowed a moiety of the moneys recovered through the information by him given to the government. The act of June 6, 1872, section 39 (*Ib.*, 256), repealed so much of section 179 of the act of July 13, 1866, as provided for moieties to informers, and provides that thereafter informers shall be paid such sums as the Secretary of the Treasury may approve—not exceeding the *amount appropriated*; and it made an appropriation of \$100,000 for detecting and bringing to trial, &c., persons guilty of violating the internal-revenue law. After the passage of this repealing act, it does not seem that, under proper construction, a contract for detecting persons who were guilty of withholding internal-revenue taxes from the government, when the informer was to get a *moiety of the proceeds* recovered, could have any force. The repealing provision was passed so as to abolish the moiety system in revenue cases. This is a notorious fact of public history, and notice of such fact must be taken in construing this provision so as to give it the effect intended by Congress. After the passage of the act of June 6, all moneys recovered on information of informers, were, under the general provisions of law (act of March 3, 1849, sec. 1, 9 Stats., 398; Rev. Stats. 3617)—to which the contract provision of the act of May 8, 1872, was an exception—payable into the Treasury without deduction or abatement. Hence, it would be held that after June 6, 1872, all contracts for moieties were abolished, and informers were to be paid only such sum as the Secretary thought proper, and not from the moneys recovered, but from the appropriation for detecting frauds, &c. (District Land Office Case, 2 Lawrence, Compt. Dec., 2d ed., 415.)

While the provisions of the act of May 8, 1872, have been incorporated in section 256 of the Revised Statutes, it must, nevertheless, be clear that although moieties might, after the enactment of the Revised Statutes, be paid for moneys recovered on information, contracts for such

moieties entered into prior to such enactment were inoperative after June 6, 1872.

The result is—

1. When balances, payable out of an existing appropriation, shall be certified by the Comptroller (Rev. Stats., 191, 269) in favor of Sanborn, the Secretary of the Treasury will be advised, by a statement in the certificate, to insert in the warrant to be issued thereon (Rev. Stats., 248, 1269) a direction to the Treasurer to withhold the same, and all payment thereon, until further instructed, after the determination of judicial proceedings, to be instituted by the United States under the act of March 3, 1875 (18 Stats., 481), to settle the rights of the parties. It is advisable that the warrants issue, in order that the appropriations out of which they shall be payable may not be covered into the Treasury, and thus become unavailable when the time for settlement arrives. (Rev. Stats., 3669, 3690, 3691; act June 16, 1874, sec. 2, 18 Stats., 72; act June 20, 1874, sec. 5, 18 Stats., 110; 15 Op. Att. Gen., 357; act March 3, 1875, sec. 5, 18 Stats., 418.)

2. As to the claim in favor of Sanborn, which is to be reported to the Speaker of the House of Representatives, under the act of June 14, 1878 (20 Stats., 130), when an appropriation may be made for the payment thereof, the balance which has been ascertained to be due will then be certified with a statement in the certificate in the same form as in the other certificates.

When a valid claim is ascertained to exist by the Auditor and Comptroller, for the payment of which the proper appropriation has been exhausted or covered into the Treasury, the Comptroller does not certify the balance due as for payment. He ascertains its existence and reports the amount found due to the Secretary, who reports to the Speaker of the House of Representatives, under the provisions of the act of June 14, 1878, which, in such case, require the accounting officers "to receive, examine, and consider the justice and validity" of such claims. The balance is certified for payment only after a specific appropriation is made for the payment of the amount allowed.

When the balances shall be certified in this case, the certificates will advise the Secretary accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, August 2, 1882.

IN THE MATTER OF THE EXTENSION OF THE LEGISLATIVE, EXECUTIVE, AND JUDICIAL APPROPRIATIONS FOR THE FISCAL YEAR 1882 TO A PORTION OF THE FISCAL YEAR 1883.—APPROPRIATION-EXTENSION CASE.

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1. The appropriations made by the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1882, having expired at that date, and no similar appropriations having then been made for the next fiscal year, Congress by joint resolutions extended the previous appropriations to August 5, when the general appropriation act for the fiscal year ending June 30, 1883, became a law; *Held*, under the peculiar provisions of these laws:

- (1.) Payments to officers and employes provided for in the legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1882, are to be made at the rate therein prescribed during the period from July 1 to August 4, 1882, both dates included.
- (2.) Persons appointed to new offices created by the appropriation act of August 5, 1882, will be paid at the rate which it prescribes only after taking the oath of office and entering on the discharge of duty in such offices.
- (3.) The increase on previous rates of salaries made by this act is *retroactive* in respect to existing offices and employments, and payments are to be made accordingly. The retroactive increase is payable for such portion of the period, from June 30 to and including August 4, as any officer or employé may have served, though he may have meanwhile resigned.
- (4.) The reduction made by this act on previous rates of salaries is *retroactive*, and an officer paid from June 30 to August 4, at the previous higher rate, is chargeable with the excess received by him above the rate prescribed by the act of August 5.
- (5.) In an office or employment in which previous to the act of August 5 the incumbent or employé was in receipt of a *per diem* compensation, and for which the rate of compensation, whether by *per diem* or salary, has been increased by that act, the increase takes effect on the commencement of the current fiscal year.
- (6.) In cases where the act of August 5 abolishes offices of a lower grade and compensation, and substitutes others of a higher grade and compensation, a person promoted or appointed to such higher grade office becomes entitled to the salary thereof only from the time he enters on its duties.
- (7.) Construction given to section 4 of the legislative, executive, and judicial appropriation act of August 5, 1882.
- (8.) The appropriations made by sections 2 and 3 of the deficiency appropriation act of August 5, 1882, are permanent specific appropriations.

The "act making appropriations for the legislative, executive, and judicial expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes," was approved by the President August 5, 1882. (22 Stats., 219, 256.)

The appropriations made by the act of March 3, 1881 (21 Stats., 385), for the legislative, executive, and judicial expenses of the government for the fiscal year ending June 30, 1882, being applicable to the expenses of that fiscal year only (Rev. Stats., 3678, 3679, 3690), and the bill containing the appropriations for the fiscal year ending June 30, 1883, not yet having become a law, Congress passed the following joint resolution in order to provide temporarily for the expenditures of the government:

"Resolved, That all appropriations for the necessary operations of the government under existing laws which shall remain unprovided for on the thirtieth day of June, eighteen hundred and eighty-two, be, and they are hereby, continued and made available for a period of twenty days from and after that date, unless the regular appropriations therefor provided for in bills now pending in Congress shall have been previously made for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-three; and in case the appropriations, or any of them, hereby continued, are or is insufficient to carry on the said necessary operations, a sufficient amount is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to carry on the same:

Provided, That no greater amount shall be expended therefor than will be in the same proportion to the appropriations of the fiscal year eighteen hundred and eighty-two, as twenty days' time bears to the whole of said fiscal year: *Provided further*, That authority is also granted for continuing during the same period the necessary work required for public printing and binding, and for all other miscellaneous objects embodied in the sundry civil and naval appropriation acts, in advance of appropriations to be hereafter made for said objects: *And provided further*, All sums expended under this act shall be charged to and be deducted from the appropriations for like service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three."

This resolution was approved June 30, 1882 (22 Stats., 384). By subsequent resolutions these provisions were extended and continued in full force and effect to and including the 5th day of August, 1882. (22 Stats., 389, 390, 392.)

The act of August 5, 1882, (1) created some new officers, and appropriated money for the annual salaries thereof; (2) it increased the annual salary of some existing offices; (3) it reduced the annual salaries of others; (4) it changed the compensation of some legislative clerks from a *per diem* of six dollars, during the session of Congress, to an annual salary of \$2,220; (5) it abolished some offices which existed only under previous appropriations; and (6) it substituted some clerkships of higher grade and compensation for those of lower.

The question of the amount to be paid in these several classes of cases is now presented for the opinion of the First Comptroller thereon.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

The payment is to be made, in the several classes of cases above specified, as follows:

I.—Persons appointed to new offices created by the appropriation act of August 5, 1882, will not be paid the full year's salary, but only the proportionate amount thereof for that part of the year commencing on the days, respectively, on which they take the oath of office and enter on the discharge of its duties. (Evans's Case, 2 Lawrence, Compt. Dec., 1; 4 Op. Att. Gen., 219; 7 *Id.*, 303; 14 *Id.*, 406; Freeman, Asst. Att. Gen., 10 Washington Law Reporter, 392, June 21, 1882; Marbury v. Madison, 1 Cr., 156; United States v. Le Baron, 19 How., 73; s. c., 4 Wall., 642.)

As to the remaining classes it is material to consider, on general principles, the terms and effect of the act of August 5, 1882, and of the joint resolutions. The act of August 5 provides, immediately after the enacting clause—

"That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation *for the service of the fiscal year* ending June thirtieth, eighteen hundred and eighty-three, for the objects hereinafter expressed, namely:"

The act then specifies in detail the appropriations made.

On general principles this act took effect and became operative on the 5th of August. (Matthews v. Zane, 7 Wheat., 164, 211; United States v. Williams, 1 Paine, C. C., 261; The Brig Ann, 1 Gal., C. C., 62; in the matter of Welman, 20 Vt., 653; Arnold v. United States, 9 Cr., 104; in the matter of Ankrim, 3 McL., C. C., 285; 3 Op. Att. Gen., 82; Pugh v. Robinson; 1 Durnf. & E., 116; Latless v. Holmes, 4 Id., 660; The King v. Justices of Middlesex, 2 Barnewall & Adol., 818.) The joint resolutions were operative, therefore, to and including August 4, 1882; and the act of August 5 became operative on and after the latter date. But as to the salaries and compensation of all officers and employes in the public service prior to August 5, which are provided for by the act of that date, the provisions of the act are retroactive.

Had the joint resolutions not been passed, the appropriation act of August 5 would have operated retroactively as the sole appropriation and authority for payment. The joint resolutions continued in force, to August 5, the previous appropriation acts, with a provision, however, that "all sums expended under this act [joint resolution] shall be *charged to and be deducted from the appropriations for like service* for the fiscal year ending June thirtieth, eighteen hundred and eighty-three."

The joint resolutions were followed by the act of August 5, 1882, which shows by its title and terms, in connection with the clause above cited and the provisions of the joint resolutions, that it *finally fixed the amount to be paid for the entire fiscal year* commencing July 1, 1882; and that, by operation of the joint resolutions, payments are to be adjusted on this basis "for like service."

It requires clear language to give a retroactive effect to a statute, but this is found in the provisions cited. The several joint resolutions were temporary provisions passed to secure service of and payment to officers and employes until the regular appropriation act should be passed; but it is manifest that salaries for the *entire fiscal year* 1883 were intended to be paid on the basis prescribed by the act of August 5.

The result may, therefore, be stated as to the remaining classes as follows:

II.—In case of an *increase* of a salary by the act of August 5, the incumbent of an office who has been paid from and including July 1 to and including August 4, at the rate prescribed for the previous fiscal year, will be entitled to such additional sum for that period as will make the payments equal to the rate prescribed by the act for the current fiscal year. If during that period any such officer resigned, his right to the increased payment during his period of service is fixed by the statute, and it will be recognized.

III.—In case of a *reduction* of a salary by the act of August 5, the incumbent of an office, who has been paid for that part of the fiscal year ending August 5 at the prior rate, will be charged in the subsequent payment with such amount as will make his salary for the whole fiscal year 1883 conform to the reduced salary. Whether the successor of an

officer who resigned between June 30 and August 5, and who received during any part of that interval the higher rate of the previous fiscal year's appropriation, is chargeable with the difference between the sums due under both acts, or whether it is to be reclaimed by the United States from the officer to whom it was paid, is a question which it is not necessary now to decide.

IV.—Where the act of August 5 has changed the compensation of an officer from a *per diem* to a larger annual salary, such additional sum is to be paid as will make the compensation of the officer conform to the new rate for the whole fiscal year.

The act of August 5 makes no reduction in any case of a previous *per diem* compensation.

V.—Some offices existing under the appropriation act of March 3, 1881, are abolished by the act of August 5, 1882. The incumbents of such offices were properly paid at the prior rate, under the joint resolution, to and including August 4. When an office rests solely, as it may, on an appropriation act, it ceases when the appropriation therefor ceases. (Rev. Stats., 167, 169.)

VI.—The act of August 5 abolishes some offices of low grade, and creates instead higher grade offices. If a former third-class clerk be promoted to a new fourth-class clerkship, he takes the *new office* with the increased salary from the time he enters on its duties.

The Chief of the Warrant Division in the office of the Secretary will be advised accordingly, so that the proper appropriation warrant may be issued to carry the several amounts appropriated to the credit of the respective appropriations.*

VII.—The act of August 5 provides:

“SEC. 4. That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall *after the first day of October next* be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates, and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall *hereafter* be em-

* The warrant is filed in the office of the Register of the Treasury. A record is made in the First Comptroller's office of the amount credited to each appropriation.

The practice in regard to the appropriation warrants is as follows: The War, Navy, Indian, and Pension warrants are made out in the Secretary's office in duplicate, and forwarded to the First Comptroller's office for record, and to be credited on the books in his office. The original is filed with the Register of the Treasury. The duplicate is sent to the Second Comptroller, who forwards it to the proper Department and the Auditors who state the accounts under the appropriations. After the duplicate has been recorded in these offices, it is returned to the Second Comptroller for file.

In the following cases, to wit: Treasury, Customs, Internal Revenue, Public Debt, and Interior Civil, only one appropriation warrant is issued. These are also forwarded to the First Comptroller for record, and when recorded are filed in the office of the Register.

ployed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services, and after the first day of October next section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby, repealed; and *thereafter* all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered into the Treasury: *Provided*, That the sums herein specifically appropriated for clerical or other force heretofore paid for out of general or specific appropriations may be used by the several heads of departments to pay such force until the said several heads of departments shall have adjusted the said force in accordance with the provisions of this act; and such adjustment shall be effected before October first, eighteen hundred and eighty-two. And in making such adjustment the employees herein provided for shall, as far as may be consistent with the interests of the service, be apportioned among the several States and Territories according to population: *Provided further*, That any person performing duty in any capacity as officer, clerk, or otherwise in any department at the date of the passage of this act who has heretofore been paid from any appropriation made for contingent expenses or for any contingent or general purpose, and whose office or place is specifically provided for herein, under the direction of the head of that department may be continued in such office, clerkship, or employment without a new appointment thereto, but shall be charged to the quotas of the several States and Territories from which they are respectively appointed and nothing herein shall be construed to repeal or modify section one hundred and sixty-six of the Revised Statutes of the United States." (22 Stats., 255.)

Questions have arisen under this section affecting officers and employés heretofore paid from appropriations for general objects.

There is a long-standing practice of paying, out of appropriations for general objects, the compensation of clerks and employés not specifically authorized or appropriated for in the regular executive appropriations. Thus, by way of illustration, the sundry civil act of March 3, 1881 (21 Stats., 441), made a general appropriation, as follows:

"Suppressing counterfeiting and similar felonies: For expenses of detecting and bringing to trial and punishment persons engaged in counterfeiting Treasury notes, bonds, national-bank notes, and other securities of the United States, as well as the coins of the United States, and other felonies committed against the laws of the United States relating to the pay and bounty laws, and for no other purpose whatever, eighty thousand dollars."

The following persons were employed in the Secret Service and paid out of the appropriation for the fiscal year 1882, with annual compensation fixed by the Secretary of the Treasury: One chief, \$3,500; chief clerk, \$2,000; one clerk, class four, \$1,800; three clerks of class two, each \$1,400; one clerk, \$1,100; one attendant, \$900.

The act of August 5, 1882, makes an appropriation for the fiscal year 1883, as follows:

“SECRET SERVICE DIVISION.—For one chief, three thousand five hundred dollars; one chief clerk, two thousand dollars; one clerk of class four; two clerks of class two; one clerk of class one; one clerk at one thousand dollars; and one attendant at six hundred and eighty dollars; in all, twelve thousand nine hundred and eighty dollars.”

The sundry civil act of August 7, 1882, for the fiscal year 1883, appropriates for “suppressing counterfeiting and similar felonies,” \$67,000.

It will thus be seen that the specific appropriation made for 1883 makes certain changes in the grade and compensation of clerks, and reduces the compensation of the attendant, as follows: One clerk of class two *omitted*, but place supplied with clerk of class one at \$1,200 salary; one clerk, salary reduced from \$1,100 to \$1,000; one attendant, compensation reduced from \$900 to \$680.

The clerks and employé in service for 1882, who continued to August 5, were paid to this latter date by authority of the joint resolutions. But the inquiry now arises as to the continued employment and payment of the clerk omitted, and as to the case of the clerk and attendant whose compensations have been reduced by act of August 5.

The 4th section of this act was the product of sundry amendments and changes in its progress through Congress, and it is not strange that it may seem somewhat difficult to reconcile all its clauses, and yet all are to be considered together, and effect given to the intention of Congress when ascertainable.

It is clear that Congress intended that, after October 1, 1882, “no civil officer, clerk, * * * or employee * * * in any of the Executive Departments” should be employed, “except only at such rates and in such numbers respectively as may be *specifically* appropriated for by Congress.” In other words, Congress intended that, after October 1, clerks and employés should not be paid out of appropriations for general purposes, but only from such as specifically provided for the payment of such clerks and employés.

But it is evident that Congress intended to give the heads of departments until October 1 to adjust the force employed during the fiscal year 1882. On and after that date, the number of clerks and employés must not exceed the number provided for in the act of August 5, 1882.

The result is—

1. The clerk of class two not provided for in the act of August 5 may be retained until October 1, 1882, and paid from the appropriation of \$67,000 for suppressing counterfeiting, &c.

The Secretary of the Treasury can determine which two of the three

clerks shall be retained as clerks of class two on the salary specifically appropriated for by act of August 5, and which one shall be paid from the appropriation of \$67,000.

The Secretary can designate the clerk of the second class not provided for to the place of the clerk of class one authorized by act of August 5; in which event he would be paid from the specific appropriation—not from that for suppressing counterfeiting. Or the Secretary can appoint any other person to this clerkship.

2. Similarly one clerk in service for the fiscal year 1882 can be retained to October 1, and paid from the appropriation of \$67,000. Or he may be appointed at any time to the clerkship, with a salary at the rate of \$1,000 per annum, after being so appointed.

3. The compensation of the attendant in service in 1882 is reduced for 1883 from an annual salary of \$900 to \$680. This latter sum is the full compensation to which he is entitled for the year; and, so far as he has been paid in excess of this rate, from June 30 to and including August 4, he is to be charged with the excess. He is to be paid from the specific appropriation.

4. So far as the act of August 5 makes specific appropriations for clerks of the same number and grade, or employés in the same position, as in the fiscal year 1882, such clerks and employés “may be continued without a new appointment.”

The “attendant” already mentioned may be so continued.

There were sundry general appropriations for 1882 out of which clerks and employés were paid, and the example above given will serve to present the principle applicable to them.

VIII.—The deficiency appropriation act of August 5, 1882, provides:

“SEC. 2. That for the payment of claims certified to be due by the several accounting officers of the Treasury Department under appropriations the balances of which have been exhausted or carried to the surplus fund under the provisions of section five of the act of June twentieth, eighteen hundred and seventy-four, and under appropriations heretofore treated as permanent, being for the service of the fiscal year eighteen hundred and eighty-one and prior years, and which have been certified to Congress under section four of the act of June fourteenth, eighteen hundred and seventy-eight, as fully set forth in House Executive Document Number Twenty-six, Forty-seventh Congress, first session, there is appropriated as follows.”

This section then specifies the several kinds of services and liabilities for which appropriations are made; and the names of the beneficiaries are given in the document referred to. These, as well as the appropriations made in section 3, are permanent specific appropriations which continue available for an indefinite time, under the provisions of the act of June 20, 1874, sec. 5 (18 Stats., 110), and are not to be covered into the Treasury, under section 3690 of the Revised Statutes.

TREASURY DEPARTMENT,

First Comptroller's Office. August 7, 1882.

IN THE MATTER OF THE APPROPRIATION MADE BY THE ACT OF AUGUST 7, 1882 (22 STATS., 315), FOR THE NATIONAL BOARD OF HEALTH.—
BOARD OF HEALTH CASE.

- i. The National Board of Health was created under and by virtue of the act of Congress of March 3, 1879 (20 Stats., 484), and by that and the acts of June 2, 1879 (21 Stats., 5), July 1, 1879 (21 Stats., 46), and June 14, 1879 (21 Stats., 50), it is authorized to—(1) obtain information on all matters affecting public health, (2) advise public authorities in relation thereto, (3) aid, so far as it lawfully may, State and municipal boards of health in preventing the introduction of contagious or infectious diseases and (4), with the approval of the President, make regulations to establish and conduct quarantine stations. Appropriations were made for the National Board of Health by acts of March 3, 1879 (20 Stats., 485), June 2, 1879 (21 Stats., 7), June 16, 1880 (21 Stats., 266), and March 3, 1881 (21 Stats., 442), large balances of which remain unexpended.
2. The act of August 7, 1882, appropriates money for the salaries of officers and employes and for office and miscellaneous expenses of the National Board of Health, and \$50,000 "for aid to State and local boards of health, and to local quarantine stations in carrying out their rules and regulations," and provides "that no other public money than that hereby appropriated shall be expended for the purposes of the Board." *Held:*
 - (1.) That the National Board of Health is authorized to select the State and local boards and quarantine stations to be aided from the appropriation of \$50,000 by the act of August 7, 1882.
 - (2.) This appropriation cannot be used for any other purposes than those specified in the clause appropriating the \$50,000.
 - (3.) No part of this appropriation can be used for expenses of "inspection stations," existing solely under the authority and appointment of the National Board of Health. It is to be used exclusively "for aid (1) to State and local boards of health and (2) to local quarantine stations in carrying out their rules and regulations."
 - (4.) The National Board of Health is authorized to judge of the kind of aid to be rendered to such boards and stations, whether in money, sanitary stores and supplies, hospital aid, services of physicians, nurses and other persons employed by the National Board, or otherwise, as it may authorize, subject to the regulations of the local boards.
 - (5.) Under the proviso in the act of August 7, 1882, unexpended balances of appropriations previously made can only be used in paying liabilities lawfully incurred prior to the date of said last-named act.
 - (6.) The First Comptroller, when charged with the duty of settling the accounts of a disbursing officer, must necessarily decide whether such officer has authority to make disbursements; and, if he has not, he is not entitled to the fees of a lawful disbursing officer.

The act of March 3, 1879 (20 Stats., 484), authorized the creation of a National Board of Health, with powers therein defined. The act of June 2, 1879 (21 Stats., 5), provides:

"SEC. 3. That the National Board of Health shall co-operate with and, so far as it lawfully may, aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, and into one State from another; and at such ports and places within the United States as have no quarantine regulations under State authority where such regulations

are, in the opinion of the National Board of Health, necessary to prevent the introduction of contagious or infectious diseases into the United States from foreign countries, or into one State from another; and at such ports and places within the United States where quarantine regulations exist under the authority of the State, which, in the opinion of the National Board of Health, are not sufficient to prevent the introduction of such diseases into the United States, or into one State from another, the National Board of Health shall report the facts to the President of the United States, who shall, if, in his judgment, it is necessary and proper, order said Board of Health to make such additional rules and regulations as are necessary to prevent the introduction of such diseases into the United States from foreign countries, or into one State from another, which, when so made and approved by the President, shall be promulgated by the National Board of Health and enforced by the sanitary authorities of the States, where the State authorities will undertake to execute and enforce them; but if the State authorities shall fail or refuse to enforce said rules and regulations the President may detail an officer or appoint a proper person for that purpose."

August 14, 1882, the disbursing agent of the National Board of Health by letter asked the First Comptroller whether the \$50,000 appropriated by the act of August 7 is placed "under the direction of the National Board of Health as a part of its appropriations for carrying out the purposes of the various acts creating the same"; and he says:

"In carrying out the provisions of section three (3) of the act of June 2, 1879, the Board, at the request of State and local boards of health, established several inspection stations to prevent the introduction and spread of small-pox and yellow fever, and these stations are still in operation, and, unless the expenses incurred can be paid from the appropriation for aid to State and local boards, these stations must be closed, and the object of the appropriation defeated."

The sundry civil appropriation act of August 7, 1882, appropriates and provides:

"For salaries and expenses of the National Board of Health as follows:

"For pay and expenses of the members of the National Board of Health, ten thousand dollars

"For pay of Secretary and disbursing agent, and pay of clerks, messengers, and laborers, five thousand five hundred dollars.

"For rent, light, fuel, furniture, stationery, telegrams, and postage, two thousand dollars

"For miscellaneous expenses, five hundred dollars

"And the President of the United States is hereby authorized, in case of a threatened or actual epidemic, to use a sum not exceeding one hundred thousand dollars, out of any money in the Treasury not otherwise appropriated, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same

"For aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States, fifty thousand dollars: *Provided*, That no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health: *And provided further*, That hereafter the duties and investigations of the Board of Health shall be confined to the diseases of cholera, small-pox and yellow fever."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

Several questions are presented for an opinion:

I. The appropriation act of August 7, 1882, appropriates \$50,000 to be used "for aid to State and local boards of health and to local quarantine stations." The act does not state what authority shall select the State and local boards and quarantine stations to be aided. This is left to be determined by other law—the act of June 2, 1879—which provides "that the National Board of Health shall co-operate with and, so far as it lawfully may, aid State and municipal boards of health." The words "it lawfully may" became operative by the appropriation, and gave the National Board of Health authority to select the State and local boards and quarantine stations to be aided. This has been the usage since the Board was created, and the appropriation in question was made upon the estimates submitted to Congress by the National Board.

II. The appropriation referred to cannot be used "for carrying out [all] the purposes for the various acts creating" the National Board. Sundry powers are given to this Board by the acts of March 3, 1879 (20 Stats., 484), June 2, 1879 (21 Stats., 5), July 1, 1879 (21 Stats., 46), and June 14, 1879 (21 Stats., 50). The appropriation of \$50,000 cannot be used "for carrying out the purposes" of these acts, except so far as the special purposes named in the appropriation act of August 7, 1882, are comprehended in them. In other words, the use of the appropriation is limited, by the act making it, to rendering "aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States." This includes any contagious or infectious disease, and is not limited to "cholera, small-pox, and yellow fever." The general duties and powers of the National Board to make investigations, as given by prior acts, are, since August 7, 1882, "confined to the diseases of cholera, small-pox, and yellow fever." But the money appropriated is limited to the uses specified. The appropriation to be used under the direction of the President by the act of August 7, 1882, is not so limited. He may direct its expenditure "in aid of State and local boards or otherwise, in his discretion." The appropriations made by the same act for telegrams, postage, and miscellaneous expenses may be used in executing the general powers of the Board, and are to be deemed the only provisions for these purposes.

III. No part of this appropriation of \$50,000 can be used for expenses of "inspection stations," existing solely under the authority and appointment of the National Board. "Inspection stations" and "quarantine stations" are substantially the same. At each of these a proper person boards vessels to ascertain the presence of disease, and makes report to the quarantine or health officers for appropriate action. The appropriation now in question is to be used "for aid [1] to State and local boards of health and [2] to local quarantine stations in carrying

out their rules and regulations." This shows that the quarantine stations to be aided are not those under the National Board, but those which exist under local authority, State, city, &c. Of course the local authorities can appoint the same inspectors heretofore in the service of the National Board; but they must be under local control; they are to carry out the local "rules and regulations." Congress seems to have supplied the necessity for quarantine stations under national authority by the power given to the President.

IV. The National Board is authorized to judge of the kind of aid it will render to such State and local boards and quarantine stations, whether in money, sanitary stores and supplies, hospital aid, services of physicians, nurses, and other persons employed by the National Board, or otherwise, as it may authorize, all subject to the regulation of local boards. This has been the usage heretofore, and it is to be presumed the appropriation was made in view of this. The statute does not say money shall necessarily be paid to local boards. It is aid that is to be rendered. Some authority must judge of its kind, and the law may fairly be construed to give the authority to determine this to the National Board. The President can exercise a similar authority as to the appropriation under his control.

The appropriation of \$50,000 will be advanced, from time to time, on the requisitions of the National Board of Health, to its disbursing officer, and the board will be required to account for its expenditures with vouchers filed in the office of the First Auditor.

V. The effect of the proviso in the act of August 7th, 1882, "that no other public money than that hereby appropriated shall be expended for the purposes of the Board of Health," is to prohibit the use of all unexpended balances of appropriations made by prior acts, except in liquidation of liabilities incurred prior to August 7, 1882. The act of March 3, 1879 (20 Stats., 485), appropriated for the National Board \$50,000; the act of June 2, 1879 (21 Stats., 7), \$500,000; the act of June 16, 1880 (21 Stats., 266), \$175,000; and the act of March 3, 1881 (21 Stats., 442), \$175,000. Large balances of the appropriations made prior to 1882 remain unexpended. The words "hereby appropriated" are not limited to the clause in which they are found, but apply to the act and its several items of appropriation. The several appropriations "for salaries and expenses" closing with "miscellaneous expenses, five hundred dollars," are all that can be used for the general purposes of the National Board, and in execution of its powers under various statutes. Congress, by placing \$100,000 under the control of the President, and by limitations apparent in the act of August 7, 1882, evinced a purpose to restrict the powers and sphere of the operations of the Board, and, as a part of this policy, prohibited the use of any previous appropriations, except in paying liabilities incurred prior to August 7, 1882, out of the appropriations from which they are properly payable. (See debates in Congress August 4, and 6, 1882, Congressional Record, August 5 and 7.) The National

Board was, by the act of that date, limited, so that the appropriation of \$50,000 could not be used for all the purposes to which prior similar appropriations were applied; and its investigations of disease were limited to "cholera, small-pox, and yellow fever."

For some purposes the National Board of Health is under the direction of the Secretary of the Treasury (act June 2, 1879, sec. 8-21 Stats., 7), and for some purposes under the direction of the President. (*Id.*, sec. 3.) It is important to settle in advance of expenditures the proper authority to make them, because the question will arise and must be decided by the First Comptroller in settling the accounts of disbursements. (Rev. Stats., 191, 269, 277; 1 Lawrence, Compt. Dec., Appx., chap. xii; Huidekoper's Case, *ante*, 155; s. c., 2 Lawrence, Compt. Dec., 351 (1 ed.). This involves the legality of disbursements, including the authority to make them.

The disbursing agent of the National Board will be advised in accordance with the principles stated.

TREASURY DEPARTMENT,

First Comptroller's Office, August 16, 1882.

IN THE MATTER OF THE PRESIDENT'S AUTHORITY, IN CASE OF A THREATENED OR ACTUAL EPIDEMIC, TO DIRECT WHO SHALL EXPEND THE \$100,000 APPROPRIATED BY THE SUNDRY CIVIL ACT OF AUGUST 7, 1882 (22 STATS., 315), IN AID OF STATE AND LOCAL BOARDS OF HEALTH, ETC.—EPIDEMIC DISEASE CASE.

1. The want of appropriate punctuation in a sentence of a statute cannot change its meaning, when the intention of the law-maker is sufficiently clear.
2. Since the creation of the National Board of Health, by the act of March 3, 1879 (20 Stats., 484), general appropriations for aid to local quarantine stations and boards of health have been properly expended under its direction, by virtue of the general authority of section 3 of the act of June 2, 1879 (21 Stats., 5).
3. When an appropriation is made for the service of a department, and no specific authority is given for its disbursement, it is to be disbursed under the direction of the head of the department.
4. For the purpose of executing the provisions of the act of August 7, 1882 (see Stats., 315), appropriating, in case of a threatened or actual epidemic, \$100,000, in aid of State and local boards of health, &c., the President is authorized to select the boards to be aided, the kind of aid to be furnished, and the officers or agents through whom it is to be expended, and to give them such directions for the purposes specified in the act as in his discretion he may deem proper.
5. A special and particular provision in a statute on one subject must, as to such subject, prevail over a general provision in that or other existing statute sufficiently comprehensive to include it.
6. When a special authority is given to the President to use money for a particular purpose, it will, in the absence of a restraining statute, be construed as plenary and ample to apply it to the authorized object.

7. The duty, to "take care that the laws be faithfully executed," required of the President by the Constitution, does not require him in person to execute the provisions of appropriation acts, although he is authorized by such acts to use the money appropriated in his discretion. He may select proper officers or agents to execute them.
8. The act of August 7, 1882, does not require the President in person to select the beneficiaries of the fund appropriated for sanitary purposes. He may delegate his entire authority over the fund to such agent or officer as he may deem proper.

August 16, 1882, the disbursing agent of the National Board of Health addressed a letter to the First Comptroller, calling his attention to that clause of the sundry civil appropriation act of August 7, 1882, authorizing the use of \$100,000, "in case of a threatened or actual epidemic," and asking "for a construction of the statute * * * whether said sum is an appropriation to be expended by the National Board of Health under the direction of the President, or whether the expenditure of said sum may be assigned to any other organization in his discretion." He calls "attention to the following suggestions:" (1) That by the act of March 3, 1879 (20 Stats., 484, sec. 2), the National Board is made the adviser of the departments of government in matters of public health; (2) that it is directed to co-operate with the Academy of Science, and consult with sanitary organizations, and report to Congress; (3) that the act of June 2, 1879 (21 Stats., 5), makes it unlawful for merchant vessels to enter ports, except under regulations made in pursuance of the act; (4) that, upon request of the National Board, the President is authorized to detail medical officers to foreign ports; (5) that the Board shall co-operate with and, so far as it lawfully may, aid State and municipal boards of health; (6) that the National Board shall report to the President ports and places requiring health regulations, and frame them under his direction; (7) that the Board shall make regulations for vessels at the port of departure, and on voyage; (8) collect sanitary information, and (9) report operations and recommendations to the Secretary of the Treasury for transmission to Congress; (10) that this act provides for the detail by the President, on request of the board, of government officers to act under its direction, and (11) repeals all laws requiring the Surgeon-General of the Marine Hospital Service to frame regulations and give notice of the approach of infected vessels; (12) that, since this repeal, the board is the only organization as adviser of the departments on health, or authorized to frame and execute regulations for the protection of health; (13) that, since the organization of the board, appropriations have been made on its estimates for the expenditure of \$100,000, contingent upon an epidemic, and under the general head of salaries and expenses of the National Board, and uniformly "for aid to State and local boards;" (14) that such prior appropriations were expended under the direction of the board, and (15) that the appropriation of \$100,000 by the act of August 7, 1882, is under the general head of "salaries and expenses of the National Board," and is immediately connected with the appropriation "for miscellaneous expenses" of the

board by the word "And," all in one sentence, and is not a distinct appropriation to be disbursed by another organization. The letter concludes with an inquiry, whether the clause, as to \$100,000, does not mean that the President is authorized to aid State and local boards through the channel of the National Board.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The questions now presented are intimately connected with those involved in the preceding case; an examination of which will aid in considering these.

1. The sundry civil appropriation act of August 7, 1882 (22 Stats., 315), under the caption of—"For salaries and expenses of the National Board of Health as follows:"—appropriates money for pay and expenses of the members of the board, for pay of secretary and disbursing agent, and of clerks, messengers, and laborers, for rent and other items named; and then follows:

"For miscellaneous expenses, five hundred dollars

And the President of the United States is hereby authorized, in case of a threatened or actual epidemic, to use a sum not exceeding one hundred thousand dollars, out of any money in the Treasury not otherwise appropriated, in aid of State and local boards or otherwise, in his discretion, in preventing and suppressing the spread of the same."

In the act as printed, and in the original roll, there is no punctuation mark between the two words "dollars" and "And." But this is not deemed material, as affecting the sense. If the whole is one sentence, the antithesis still exists between the different powers to use the two appropriations. Since the creation of the National Board of Health by the act of March 3, 1879 (20 Stats., 484), appropriations made "for aid to local quarantine stations and for aid to local and State boards of health, to be used in case of epidemic" (act June 16, 1880, 21 Stats., 266; act March 3, 1881, 21 Stats., 442), have been expended under its direction. This was authorized by the act of June 2, 1879 (21 Stats., 5, sec. 3), which provides "that the National Board of Health shall co-operate with and, so far as it lawfully may, aid State and municipal boards of health in the execution and enforcement of the rules and regulations of such boards to prevent the introduction of contagious or infectious diseases," &c. No other provision was made for directing the expenditure of such appropriations; and it is not to be presumed an appropriation is made with no authority to direct its disbursement when a statute is found which may be fairly construed as giving such authority. When an appropriation is made for the service of a department, and no specific authority to direct its disbursement is mentioned in the statute, or elsewhere, it is necessarily to be disbursed under the direction of the head of the department. The clause making the appropriation (of \$100,000,) now in question is to be construed in view of these principles. The exe-

cution of the purposes of the appropriation "in aid of State and local boards or otherwise" requires, (1) the selection of the boards or beneficiaries to be aided, (2) the selection of the kind of aid to be furnished, whether money, sanitary stores, medical assistance, or other forms of relief, and (3) an officer, or authorized person, to make the selections and execute the purposes of the act. Congress did not leave the execution of the appropriation act, as to the sum in question, to the operation of the general statute giving it to the National Board, but made a special provision, by which "the President * * * is * * * authorized, * * * to use * * * one hundred thousand dollars, * * *, in aid of State and local boards or otherwise, in his discretion." This is a special provision—a change in the general law on the subject. It is well settled by a rule in the construction of statutes, that effect must be given to the purpose of the change. The purpose to make a reduction of the powers of the National Board has been shown in the preceding case.

Again, it is a rule that "a particular enactment must prevail over a general enactment in the same statute; the general enactment must be taken to affect only the other parts of the statute to which it may properly apply." See numerous authorities in *Huidekoper's Case*, *ante*, 161. Effect, then, is to be given to the clause making special provision as to the use of the appropriation. The President's authority is to use the money "in aid of State and local boards or otherwise, in his discretion." Among the definitions by Webster of the verb to use, is, "to put to a purpose." The President cannot put the money to a purpose without (1) selecting the beneficiaries, (2) the kind of aid to be furnished, and (3) the officer or agency to apply it. It is the duty of the President to "take care that the laws be faithfully executed." (Const., Art. 2, sec. 3.) When the statute prescribes the agency to execute a law, it must be employed. When it authorizes the President to execute the law, he has, upon general principles of official agency, incidental authority to select the necessary agencies for the purpose. He is not required in person to execute a law of this character. (1 Op. Att. Gen., 624.) And a power to use money for a specified purpose clearly carries with it the authority to select the agency to do so. Such authority is special, and is to be construed in this case by the special words given it; and these are not controlled by general laws applicable to appropriations for similar purposes, but in which no special direction is given as to the authority to use them. Besides this, the clause in question by any fair interpretation expressly gives the President authority to exercise his "discretion" in selecting the agencies to be employed. The words "in his discretion" are not limited to a selection of the beneficiaries, but apply to the whole authority to use the money. General words may sometimes be restrained in their application, but only when a purpose is apparent that they shall be restricted. No such purpose is apparent here. The fact that the use of this money is not given to the National

Board, and that its powers are otherwise restricted, shows that Congress did not intend that the general authority of the Board should extend to it. Congress has, in effect, said to the President: I will by law—

“That thou wouldst use the power
Which thy discretion gives thee to control
And manage all.”

Thus the National Board has no authority to aid in preventing the introduction of disease, except where there are “State and municipal boards” (act of June 2, 1879), and where there are “local boards * * * and * * * local quarantine stations” (act of August 7, 1882). All outside of this is by the last-named acts left to the authority of the President. The act of August 7, 1882, authorizes the use of the \$100,000 it appropriates “in aid of State and local boards or otherwise, in his discretion.” If the President should deem it expedient to use this fund “otherwise,” where there are no State or local boards, clearly the National Board has not, and never had, authority to disburse money at any such places. At such places the President could under the act of June 2, 1879, and without that of August 7, 1882, expend the appropriation, but the latter act gives still more comprehensive and independent authority. As the National Board has not by any law any authority over such expenditures, it is apparent that Congress did not intend that it should have any authority over this appropriation. A divided authority would be impracticable.

2. The act of August 7, 1882, provides that “the duties * * * of the [National] Board of Health shall be confined to the diseases of cholera, small-pox and yellow fever.” The same act gives the appropriation to be used by the President “in preventing and suppressing the spread” of any “epidemic.” He is not limited to the diseases named. If he should decide to use it for other diseases, the National Board has no authority by statute as to such diseases.

3. It is not doubted but the President has power in person to employ physicians and nurses, and purchase medicines and sanitary stores, and use in this mode the whole fund. If so, he has a choice of means, and may execute the law without the aid of the National Board. If so, he may select any other appropriate agencies. If officers be selected, they become special agents for the purposes of the appropriation. This is rendered certain by other considerations.

The act of June 2, 1879 (21 Stats., secs. 3, 5), only gives the National Board authority to “aid State and municipal boards of health * * * to prevent the introduction of contagious or infectious diseases.” There is in it a provision, by which the National Board may report to the President that there is a necessity for quarantine regulations, at places where none exist by local authority, or the existing regulations are not sufficient, and the President may then order the National Board “to make such additional rules and regulations; * * * but if the State authorities shall fail or refuse to enforce said rules and regulations, the

President may detail an officer or appoint a proper person for that purpose."

The President is not required in person to superintend the use of the money appropriated, or select the beneficiaries to be aided, but may delegate the whole authority on the subject to the head of a department, or other officer or agent. The general rule is, that when authority, and especially if requiring the exercise of discretion, is given to private agents, or officers who are public agents, they cannot delegate it to others. (7 Op. Att. Gen., 594.) But there are cases in which the power to do this "may be implied; as where it is indispensable by the laws [or necessity of the case] in order to accomplish the end; or it is the ordinary custom * * *; or it is understood by the parties to be the mode, in which the particular business would or might be done." (Story, Agency, § 14.) All these reasons or circumstances concur in supporting the right of the President to employ the agencies stated. The many important and great duties of the President are such, that it may be utterly impossible for him personally to do more than select an officer or agent and direct him to expend the money in his discretion. This has always been the usage under many statutes analogous in character to the appropriation act in question. Congress enacted the law in view of this general usage.

These views are well supported by authority. Thus it has been said:

"By the Constitution * * *, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion * * *. He is authorized to appoint certain officers, who act by his authority * * *. Their acts are his acts * * *." (Marbury v. Madison, 1 Cranch, 166; Wilcox v. Jackson, 13 Pet., 513; Seward's Case, 2 Lawrence, Compt. Dec., 2d ed., 57; United States v. Eliason, 16 Pet., 302; 7 Op. Att. Gen., 453.)

If it be said this principle was stated in a case where the statute specifically created the officer who acted for the President, it may also be said it is equally applicable when the statute authorizes the President to employ agents in his discretion, though not designated in number, by name, or with duties specified in the law. And the authority in this case to select agents or designate officers as such cannot be doubted. (Eveleth's Case, 2 Lawrence, Compt. Dec., 2d ed., 22.)

The President has full authority to select such officers and agents and give them such directions to carry out the purposes of the appropriation act as in his discretion he may deem proper.

TREASURY DEPARTMENT,

First Comptroller's Office, August 18, 1882.

IN THE MATTER OF THE AUTHORITY OF AN ADMINISTRATOR APPOINTED
IN THE DISTRICT OF COLUMBIA ON THE ESTATE OF A DECEASED CITI-
ZEN OF A STATE TO COLLECT TREASURY DRAFTS. HALSTEAD'S CASE.

1. When a Treasury draft has been issued in the name of a deceased claimant, payment thereof to his proper legal representative estops all persons from denying its validity.
2. At common law an administrator appointed in a foreign country, or in a State or Territory of the United States, cannot, by virtue of such appointment, maintain an action in the courts of the District of Columbia against a private citizen and debtor domiciled therein. The only remedy by suit in such case is by the grant of ancillary letters of administration in the District. The act of June 24, 1812, sec. 11 (2 Stats., 758), which changed the common-law rule in such case, is not now in force.
3. This rule of the common law is not applicable to the Government of the United States as a debtor to its own citizens. Hence an executor or administrator duly appointed in a State or Territory, on the estate of a deceased citizen thereof, is, by long-established practice in the Treasury Department, recognized as the only person authorized to collect money due such estate from the United States. In such case an administrator appointed in the District of Columbia has no authority to collect such money.
4. When money is required to be paid to a party named in a warrant directed to the Treasurer of the United States, and a draft has been issued thereon to make the required payment, the loss or destruction of the draft, or its possession by a person beyond the reach of judicial process, does not deprive the party named as payee in the warrant, or his proper legal representative, of the right to payment of the amount for which the draft was issued.

June 14, 1882, a Treasury War warrant, No. 2565, was granted by the Secretary of the Treasury, directing the Treasurer of the United States to pay John J. Pulliam \$1,223, on which the Treasurer issued a draft as follows:

Draft No. F. 19925, series of 1874. On War warrant No. 2565.

TREASURY OF THE UNITED STATES,
Washington, D. C., June 17, 1882.

Pay to the order of John J. Pulliam one thousand two hundred and twenty-three dollars.

Registered June 17, 1882.

W. P. TITCOMB,
Assistant Register of the United States.

To TREASURER U. S., *Washington, D. C.*

A. U. WYMAN,
Assistant Treasurer of the United States.

\$1,223.

There is another Treasury draft, No. F. 19926, for \$545, on similar warrant, in favor of the same payee.

Prior to the year 1882, said John J. Pulliam executed a power of attorney, with power of substitution, to Gilbert Moyers, of the District of Columbia, authorizing him to prosecute, in the Treasury Department,

the claims on which these drafts were issued, and to receive the drafts to be issued in payment thereof. Thereafter Moyers authorized Eminel P. Halstead to receive said drafts, and they were, pursuant to the delegated power, delivered by the Treasurer of the United States to said Halstead.

April 10, 1882, John J. Pulliam died intestate, in the State of Tennessee; and, August 2, 1882, "administration of all the goods, chattels, and credits of [said] John J. Pulliam, late of Fayette County, Tennessee, deceased, was, by the Supreme Court of the District of Columbia [holding a special term for orphans' court business], granted to Eminel P. Halstead, of the District of Columbia," who gave bond and was duly qualified.

Gilbert Moyers claims to be a creditor of the estate, and that, as such creditor, he is entitled to one-third of the amount of the drafts for services rendered by him as attorney in prosecuting the claims for the payment of which they were issued.

It appears that the drafts received by said Halstead, as substituted attorney for Moyers, are the only credits or assets of the estate in the District of Columbia.

August 2, 1882, administration of the estate of John N. Pulliam was granted by the same court to said Halstead. The appointment recites that said "John N. Pulliam has died intestate." Halstead's appointment is as administrator simply—not as administrator *de bonis non*. It appears that the only credits or assets in the District of Columbia of the estate of said John N. Pulliam is a similar Treasury draft, No. 19924, for \$3,020, which, when issued, was made payable to the order of John J. Pulliam, executor of John N. Pulliam. Said Halstead has possession of this draft also, under a power of attorney similar to that under which he received the other drafts.

Gilbert Moyers also claims to be a creditor of the estate of John N. Pulliam for services rendered by him as attorney in prosecuting the claims for the payment of which said draft No. 19924 was issued. John J. Pulliam and John N. Pulliam were, up to the time of their decease, resident citizens of the State of Tennessee. H. P. Hobson has been appointed Tennessee administrator with the will annexed of J. N. Pulliam, deceased, and no letters testamentary or of administration have been granted in that State on the estate of J. J. Pulliam, deceased. Eminel P. Halstead, as administrator as aforesaid, now presents all the drafts referred to, and asks for their payment on his indorsement as such administrator. The question of his right to payment is submitted by the Treasurer to the First Comptroller for his opinion and advice in the matter.

A. L. Merriman, counsel for Halstead, administrator, makes the following points:

I. The question of jurisdiction in granting letters of administration cannot be attacked collaterally except (1) when the alleged deceased

is living, or (2) when administration has been previously granted in the same jurisdiction. (*Anderson v. Duke*, 2 Rob., 102; *Hobson v. Ewan*, 62 Ills., 146; *Davis v. Swearingen*, 56 Ala., 31; *Irwin v. Scriber*, 18 Cal., 499; *Quidort v. Pergenmax*, 15 N. J., 473; *Farley v. McConnell*, 52 N. Y., 630; *Kane v. Paul*, 14 Pet., 33.) [See *Christy v. Vest*, 36 Iowa, 285; *Crosby v. Leavitt*, 4 Allen, 410; *Rorer*, *Inter-State Law*, 249.]

II. Executive officers cannot question the validity of an order of court binding under judicial rulings. The Constitution gives the conduct of government to distinct branches—legislative, executive, and judicial.

III. The court committed no error in granting administration. It was authorized by the Maryland statute in force in the District as upon "personal estate" which "lies, or is supposed to lie" in the county. (*Thompson's Digest*, secs. 30, 37.) The statute recognizes the principle of *lex loci rei sitæ*. The drafts are properly within the jurisdiction of the court, and are payable at the Treasury in Washington, and so have a situs here, both as to the property and as to the debtor. It is suggested that inasmuch as the government has no particular State or Territorial locality, therefore the drafts, although in a particular jurisdiction, have, as personal property, no situs.

IV. Were this simply a claim or demand against the government, the suggestion would have force, for then it would be a chose in action, and subject to the rule that the situs of a chose in action or a demand is the place of the debtor. The same court which granted this order has repeatedly held this view in case of applications for administrations upon estates of non-residents whose estate consisted wholly in a claim against the government, and denied such applications for want of jurisdiction; but, on the other hand, where the property is tangible, as in this case, in the form of a draft of the Treasurer, it entertains jurisdiction, and the distinction is obvious. While both are equally personal property, and properly subject to be taken into possession and converted into assets by the administrator, the one is a chose in action, simply, against a debtor having no legal locality, and the other is a commercial check, valid, when properly indorsed, in whosoever hands it may be, and, as such, property, wherever it may be. A draft or check, when issued, is in settlement and payment of a demand against the government, and the claim or demand for which it issued no longer exists. This draft is transferable by the indorsement of the payee or his legal representative, and when so indorsed becomes the property of the holder, representing, and, in fact, equivalent to money in all commercial transactions. No claim against the government can be based upon the draft, for the reason that when presented at the Treasury, properly indorsed, the holder receives the amount of money from the Treasury covered by the check.

V. There is no authority to pay the amount of the draft without the production of the same, and only in the case of its loss or destruction is

there any provision for a duplicate. (Rev. Stats., 3646, 3647; Di Cesnola's case, 2 Lawrence, Compt. Dec., 142.) The drafts are beyond the power or control of the courts of a State, nor can any administrator appointed or qualified in a State invoke the courts of the District of Columbia for redress in the recovery of such property, or as against the holder thereof. The act of 1812 (2 Stats., 758) authorizing foreign administrators to prosecute actions in the District of Columbia having been repealed, it follows that, in all proceedings involving the right or possession of property in the District of Columbia belonging to the estate of a deceased non-resident, administration under letters issued in said District is necessary.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

As the drafts in question were issued in the name of John J. Pulliam after his decease, they might, on general principles, be deemed void. But the practice has prevailed of paying drafts so issued when indorsed by the proper legal representative, and such payment estops all persons from denying its validity. (See Claims Assignment Case, *ante*, 28, Baird v. United States, 96 U. S., 431.)

The authority of the supreme court of the District of Columbia to issue letters of administration is not called in question. It would, if necessary, be presumed, in favor of the validity of its grant of administration, that there was tangible chattel property in the District to be administered for the benefit of creditors of the intestate, or that the grant was ancillary to the letters of the proper administrator in Tennessee. The question is not one affecting the jurisdiction of the court, but simply as to whether payment should be made to an administrator appointed in the county of the domicile of the deceased in the State of Tennessee, or to the administrator appointed in the District of Columbia. If the question between these rival administrators arose upon a draft made by a private citizen on, and payable by, a private citizen of the District, or upon a promissory note, or other chose in action, payable by such citizen, the law would be plain. In such case, at common law, no suit could be maintained by the Tennessee administrator in a court of the District under letters of administration granted in that State. The reasons and the purpose of this are well understood. The Tennessee law giving authority to appoint an administrator in that State can have no extra-territorial operation, and hence, as to property under a jurisdiction elsewhere, it can give no authority which can be recognized by courts of other States. Each State of the Union maintains a right to control the property within its jurisdiction as fully as if it was a foreign nation. (Rorer, *Inter-State Law*, 10, 167; *Pennoyer v. Neff*, 95 U. S., 723; *Cleveland, P. & A. R. R. Co. v. Pennsylvania*, 15 Wall., 300; *Wharton, Conf. Laws*, §§ 278, 604; *Broom, Legal Maxims*, 100.) It is a part of the same principle of sovereignty that an assignment by

operation of law has no legal operation out of the territory of the law-maker, although it is otherwise as to voluntary conveyances. (*Frazier v. Fredericks*, 4 Zab., 166; *Booth v. Clark*, 17 How., 322; *Owen v. Miller*, 10 Ohio St., 142.) The title of an administrator is created by operation of law. The purpose of this assertion by each State of the right to administer on property within its jurisdiction is to secure payment to creditors therein; hence, when there is any property to be administered in such State, and administration has been granted in another State, ancillary letters are generally required. (*Rorer*, *Inter-State Law*, 250; *Wharton*, *Conf. Laws*, § 619; *Wilkins v. Ellett*, 9 Wall., 740.) With these principles and this purpose in view, the inquiry is presented, what property is within the control and jurisdiction of the States respectively?

The general rule for many purposes is that "the legal *situs*, or locality, of bonds, mortgages, and debts generally, and all obligations and undertakings for payment of money, and all choses in action, follows the personal domicile of the owner thereof." (*Rorer*, *Inter-State Law*, 202.) Thus, the domicile of the owner, and not that of the debtor, is the place where intangibilities are taxable. (*Cleveland, P. & A. R. R. Co. v. Pennsylvania*, 15 Wall., 300; *Murray v. Charleston*, 96 U. S., 432; *Worthington v. Sebastian*, *Treasurer*, 25 Ohio St., 1.) But this principle would, if applied to cases of administration, give an administrator appointed in one State authority to sue a debtor residing in another State, and defeat a preference of creditors in the latter State. Accordingly it has been held that, "to prevent conflicting jurisdictions between different ordinaries with respect to choses in action and titles to property, it was established as law, that judgment debts were assets, for the purpose of jurisdiction, where the judgment is recorded; leases, where the land lies; specialty debts, where the instrument happens to be; and simple contract debts, *where the debtor resides at the time of the testator's death*: and it was also decided, that as bills of exchange and promissory notes do not alter the nature of the simple contract debts, but are *merely evidences of title*, the debts due on these instruments were assets where the debtor lived, and not where the instrument was found." (*Att. Gen. v. Bouwens*, 4 Mees. & W. Exch., 171-191; *Owen v. Miller*, 10 Ohio St., 144. The same principles are stated in a learned and able opinion by *Folger, J.*, in *Beers v. Shannon*, 73 N. Y., 299, citing *Kohler v. Knapp*, 1 Bradf., 241; *Byron v. Byron*, *Cro. Eliz.*, 472; *Swinburne on Wills*, 439; *Gold v. Strode*, *Carthew*, 148; *Yeomans v. Bradshaw*, *Id.*, 373. See *Miller v. United States*, 11 Wall., 268; *Tyler v. Defrees*, *Id.*, 331; *Alexandria v. Fairfax*, 95 U. S., 778.)

It may be conceded that each of the American States can prescribe and control the remedies for the collection of debts owing by citizens therein to the estates of deceased citizens of other States, not because debts are property therein, but because each State regulates, by statute or common law, its own system of remedial justice, and can, therefore,

deny a remedy to an administrator elsewhere appointed, and enforce payment to administrators appointed within its own jurisdiction. The whole question turns on (1) the policy of favoring resident creditors, and (2) the power to enforce that policy. (*Wilkins v. Ellett*, 9 Wall., 740; *Miller v. United States*, 11 Wall., 268; *Tylor v. Defrees*, *Id.*, 331; *Alexandria v. Fairfax*, 95 U. S., 778). The District of Columbia may, so far as the question under consideration is concerned, be regarded as a State, and as having, by its common law and judicial system, the power to enforce its own policy, as between private persons. (*Fenwick v. Sears's admrs.*, 1 Cranch, 259; *Mackey v. Coxe*, 18 How., 100; *Vaughan v. Northup*, 15 Pet., 1.) It was held by the Supreme Court, in 1806, under the common-law rule, that an executor could not maintain a suit in the District of Columbia upon letters testamentary granted in a foreign country; that the rights to a testator's personal property are to be regulated by the laws of the country where he lives; although suits for those rights must be governed by the laws of that country in which the tribunal is placed (*Dixon's exrs. v. Ramsay's exrs.*, 3 Cranch, 319); hence the act of Congress of June 24, 1812, sec. 11 (2 Stats., 758), was passed for the purpose of giving authority to "any person or persons to whom letters testamentary or of administration hath been or may hereafter be granted by the proper authority in any of the United States or the Territories thereof, to maintain any suit or action and to prosecute and recover any claim in the district of Columbia, in the same manner as if the letters testamentary or of administration had been granted to such person or persons by the proper authority in the said district; * * *" This statute changed the common-law rule to the extent therein provided for. It continued in force until December 1, 1873, when it was omitted, by oversight, from the Revised Statutes. But whether the statutory or the common-law rule applies in the District, as between private citizens, neither has application to the Government of the United States, or to the debts which it owes, or to its promises to pay, or to the paper evidences it has given of a right to receive money from its Treasury, so far as the rights of American citizens are concerned. A State may by virtue of its general authority "act upon the contracts made between its own citizens in every country" (*Reimsdyk v. Kane et al.*, 1 Gall., 377). Much more, therefore, may it prescribe the remedy where it is itself a party. If the principles of administration stated, and the purposes for which they were established, do not apply in the case now under consideration, the rules of law based on them can have no force or application. The reason of the law is the life of the law. *Ratio legis est anima legis. Mutata legis ratione mutatur et lex.*

1. The local policy which secures a preference to resident creditors is one with which, as between its own citizens, the United States is certainly not concerned. The government has no such policy to enforce as between its own citizens wherever they may be. It does not prefer the interests of citizens of New York to those of citizens of Ohio; it

regards with equal favor the interests of the citizens in California and the citizens in the District of Columbia. They are all citizens of one entire Nation, which is pledged in principle to secure to all "the equal protection [benefit] of the laws." Whether, as between citizens of the United States and of foreign nations, a policy may exist of giving preference, in cases of administration, to local administrators, is not now a question.*

2. For the purpose of paying its debts, the United States is not affected by any question in respect of the extra-territorial operation of laws. The government pays its debts in pursuance of its own laws, which operate over all the States and Territories and the District of Columbia. It recognizes, not only National, but also State citizenship. And when a citizen of a State has a claim against the United States for the payment of money, his rights therein, and the succession thereto, as established by the State in which he is domiciled, are recognized, so far as they do not conflict with the laws and policy of the United States. In such matters the government is not controlled by local laws in other States. No reason can be assigned for denying the authority of an administrator appointed at the domicile of the deceased, or for preferring the authority of one appointed elsewhere. Some one must be recognized, or there will be a denial of justice in a case in which there is a remedy, and this is not to be tolerated. The doctrine may be admitted, as a general rule, that an assignment by operation of law, as, for exam-

* 1. This question may arise upon awards by mixed commissions, as, for example, those of the Court of Commissioners of Alabama Claims, under the treaty with Great Britain of May 8, 1871 (17 Stats., 863), and the act of June 23, 1874 (18 Stats., 245), or those under the treaty with France of January 15, 1880 (21 Stats., 673), or those of the Joint Commission under the act of June 16, 1880 (21 Stats., 296). Claims may exist in favor (1) of aliens domiciled here, and (2) of citizens domiciled abroad. The Court of Commissioners of Alabama Claims has held that letters of administration, or letters testamentary, granted in any State of the United States, would give authority to sue in that court. Whereas, in the case of William O. Smith and others, the court denied the right of a foreign administrator to bring suit. (Senate Ex. Doc., No. 21, 2d sess. 44th Congress, 14; Report of John Davis, clerk; see, also, 8 Op. Atty. Gen., 98; 9 *Id.*, 383; Story, Conf. Laws, 5th ed., 512; *Wilkins v. Ellett*, 9 Wall., 740; *Parsons v. Lyman*, 20 N. Y., 103; *Petersen v. Chemical Bank*, 32 N. Y., 21; *Pond, admr., v. Makepeace*, 2 Metc., 114; *Stevens, admr., v. Gaylor*, 11 Mass., 263; *Abbott, admr., v. Coburn*, 23 Vermont, 663). Some cases hold that voluntary payments are only valid when there is no ancillary administration. (*Stone v. Scripture*, 4 Lansing, N. Y., 186; *Vroom v. Van Horne*, 10 Paige, Ch., 549; *Despard v. Churchill*, 53 New York, 192.) But the Supreme Court of the United States has determined that a voluntary payment of a debt to a foreign administrator is valid, even as against an ancillary administrator at the domicile of the debtor, especially if there be no creditors or persons entitled to distribution at such domicile (*Wilkins v. Ellett*, 9 Wall., 740; *Mackey v. Coxe*, 18 How., 104, see *Attorney-General v. Dimond*, 1 Crompt. & J. Exch., 356), and that the legal representative of a creditor of the government appointed in the State where the deceased was domiciled has authority to receive payment. (*Vaughan v. Northup*, 15 Pet., 1.)

2. Questions may arise in these two classes of cases as to claims allowed by executive officers. Claims against the United States pass by assignment in bankruptcy. (*Phelps v. McDonald*, 2 MacArthur, 375; s. c., 99 U. S., 298.)

ple, by administration, has no legal operation out of the territory of the law-maker. The United States could authorize administration for the purpose of paying its own debts, and direct the mode of distributing the proceeds. (2 Op. Att. Gen., 209; 16 *Id.*, 494; *United States v. Hall*, 98 U. S., 357; *Walton v. Cotton*, 19 How., 358; see 7 Op. Att. Gen., 242.) It does not choose to do so. As a matter of convenience, it adopts the administration and distribution provided for in the State of the deceased. In the present case, it may be said that the United States owes a debt in the State of Tennessee. Hence, in the absence of any National law on the subject of payment to representatives of deceased creditors of the government, the executive officers may, and are in duty bound to, take notice of the law of Tennessee. (*Edwards v. Kearzey*, 96 U. S., 595; *Dixon's exrs. v. Ramsay's exrs.*, 3 Cranch, 319; 7 Op. Att. Gen., 272.)

3. Neither any State, nor the District of Columbia, has any power to *enforce* against the United States as a debtor the local policy or preference to which reference has been made. If there is no power to enforce a policy, the policy does not exist. Where there is a right there is a remedy. *Ubi jus ibi remedium*. Where there is no remedy there can be no recognized legal right. But Congress—the branch of the government having sole control of the remedy—has not made it the duty of executive officers to prefer an ancillary administrator. It has neither adopted such policy, nor sanctioned the common-law rule, so far as the government is concerned. Neither statutes nor rules of the common law, local in policy or general in purpose, apply to or control the Government of the United States in its duties, unless by express and imperative statutory provision, or by usage well established. (*Sedgwick, Construction of Stat. and Const. L.*, 2 ed., 28, 337; 1 *Blackst. Com.*, 261; 1 *Kent's Com.*, 460; *Jones v. Tatham*, 20 Pa. St., 398.)

4. The District of Columbia is not, in its political relations to the United States, a State, nor is it in the matter of suits recognized as such in the courts of the United States. (*Hepburn v. Ellzey*, 2 Cranch, 445; 6 Op. Att. Gen., 559.) The District of Columbia owes its existence to a special power delegated by the States to Congress, and all the laws in force therein are subject to the authority of Congress.

5. The drafts in question are not property in the District of Columbia, nor are they in fact property at all. (*Murray v. Charleston*, 96 U. S., 433; *Draft Case*, 1 *Lawrence, Compt. Dec.*, 11; *Buchanan v. Alexander*, 4 How., 20.) A draft is not money; it is merely the evidence of a right to demand or receive money. The drafts—the paper evidences in this case—are at present in the District of Columbia, but the right to the money they represent exists in Tennessee, under an assignment by operation of the law of the State; and such assignments have always been recognized in this Department. The money which is to be paid on them is not necessarily in the District. The debt could be paid as well by drafts on the assistant treasurer at New York or San Francisco,

and, in practice, would be paid there if presented by a legal holder. The sub-treasury and other depositories were established for the very purpose of receiving and paying out the public moneys at points convenient to public debtors and creditors. If the government has now in the Treasury at Washington an aggregate sum of money, out of which the drafts may be paid, it has not been selected or identified, so that any title could pass to any specific portion of it; and even though it had been so selected, it would still be under executive control in the performance of the executive duty of paying it; and this duty is not subject to the control of any judicial tribunal.

6. The debtor in this case, the United States, is not domiciled in the District of Columbia. (*Vaughan v. Northup*, 15 Pet., 1; *Murray v. Charleston*, 96 U. S., 433; 6 Op. Att. Gen., 557.) The United States, as a political corporation, exists on every foot of territory within the region covered by its geographical name; and this, too, without reference to State lines. It can create debts, and pay them at any point within or beyond the geographical boundaries of the United States, as Congress may authorize. To say that such a corporate entity, or organized sovereign power, is "cabin'd, cribb'd, confin'd" within the District of Columbia is supremely absurd. No pent-up Utica contracts *our* powers. We are limited only by continental or hemispherical lines.

7. All judicial and legal authority is against the claim now made by the District administrator. In *Vaughan v. Northup* (15 Peters, 1), it was held, that "the administrator of a creditor of the government, duly appointed in the State where he was domiciliated at his death, has *full authority* to receive payment, and give a full discharge of the debt due to his intestate, in any place where the government may choose to pay it." In delivering the opinion the court, referring to the act of June 24, 1812, said that "its obvious design was, * * * to enable foreign exécutors and administrators to maintain suits, and to prosecute and recover claims in the District, not against the government alone, but against any persons whatever, resident within the District, * * *". This dictum seems to overlook the well-known rule in construing statutes, that the latter do not include or apply to the Government, unless the intention to make them apply thereto be expressed or clearly implied. The decision seems to be based, however, not on the statute alone, but, on general principles, independent of it. The court, before making any reference to the statute, gives the ground of the decision by saying:

"It has been suggested that * * * the assets * * * were received as a debt due from the government at the treasury department at Washington, and so constituted local assets within this District. We cannot yield our assent to the correctness of this argument. The debts due from the government of the United States have no locality at the seat of government. The United States, in their sovereign capacity, have no particular place of domicile, but possess, in contemplation of law, an ubiquity throughout the Union; and the debts due by them are not to

be treated like the debts of a private debtor, which constitute local assets in his own domicile."

On June 17, 1854, a claim was made that a certain sum of money, appropriated by act of May 31, 1854, to be paid by the United States to "the legal representatives of Robert Greenhow," should be paid under letters, *ad colligendum*, obtained of the proper court in the District of Columbia, and not to the executor appointed in California, the domicile of the testator. The Attorney General in advising that "the executor * * * is the only person entitled to be considered as * * * lawful representative of Robert Greenhow," referred to the act of 1812, but based his opinion also on principles independent of it, and said:

"It would, indeed, be wholly subversive of the fundamental theory of the government to assume that all debts due from the United States are to be treated as local assets, so as to draw the administration and distribution thereof away from the State in which the deceased is domiciled, and subject them to the local law of the District of Columbia." (6 Op. Att. Gen., 560.)

In *Mackey v. Coxe* (18 Howard, 103), no principle was distinctly settled affecting this question. Payment to a District administrator was recognized as valid; but this was because he combined the authority, also, of an administrator at the domicile of the deceased. Another principle was affirmed, namely, that, "although an executor or administrator cannot sue in a foreign court, in virtue of his original letters of administration, yet he may lawfully, under that administration, receive a debt voluntarily paid in any other State."

The drafts now in question are to be voluntarily paid. The government pays all its debts voluntarily. Even judgments in the Court of Claims require voluntary appropriations by Congress. No court in the District, nor in any State, can interfere with the government, or its executive officers, in paying its debts in the mode required by law, or followed in long established practice.

It seems to be supposed that the possession of the drafts in question gives a right to the District administrator to payment, and that without such possession the administrator in Tennessee can have no relief. If it were material, inquiry might be made as to whether the death of Pulliam did not revoke the powers of attorney he had given, and under which possession of the drafts was obtained.

But, even though it be admitted that possession had been lawfully obtained by Moyers or Halstead during the lifetime of Pulliam, this cannot affect the right to payment vested in the Tennessee administrator by operation of the law of his State. The right to payment arises on the warrants granted by the Secretary of the Treasury and countersigned by the First Comptroller, directing the Treasurer of the United States to pay *John J. Pulliam*. (Rev. Stats., 248, 269, 305.) These warrants might have been paid in money, or upon drafts issued for con-

venience. But until paid, the drafts are not payment. The right to payment is not lost if the drafts should be destroyed or lost, or even though they remain in the hands of another party, who originally received them under a lawful and sufficient power. A refusal to surrender a draft to the rightful claimant will generally authorize either the issue of a duplicate, or payment in money without a draft. (Di Cesnola's Case, 2 Lawrence, Compt. Dec., 142.) A court of equity can decree the surrender of a draft by a party unlawfully detaining it.

Whether the rightful owner of the drafts now in question could maintain an action against the United States in the Court of Claims, in case he fails to obtain possession of them, may not be clear. But whether he could or not, the United States could, if it were deemed necessary, file a bill of interpleader, and require a judicial determination of the rights of the rival administrators in this case; or, it might withhold payment until the rival administrators had secured a judicial determination of their respective rights. But parties whose rights are, as in this case, clear, should not be subjected to the expense and the attendant delay of such proceedings. The proper administrator duly appointed in Tennessee is entitled to payment of the drafts issued in the name of John J. Pulliam. The draft to J. J. Pulliam, executor, is payable to the proper administrator *de bonis non* with the will annexed of John N. Pulliam. If the present holder of these drafts refuses to surrender them, duplicates may be issued to the Tennessee administrator, on filing the necessary indemnity bonds required by regulations, as in the case of lost drafts.

TREASURY DEPARTMENT,

First Comptroller's Office, August 11, 1882.

IN THE MATTER OF APPOINTMENT OF CLERKS IN THE TREASURY DEPARTMENT TO INVESTIGATE THE OFFICES OF COLLECTORS OF INTERNAL REVENUE.—CLERKS' INVESTIGATION CASE.

1. The Secretary of the Treasury, as incident to the authority given him by law, would have, on general principles, power to appoint a clerk in the Treasury Department, or other person, as special agent, to investigate the office of a collector of internal revenue.
2. This incidental authority cannot arise, if (1) specific provision is made by statute ample and plenary for this service, or (2) when its exercise is expressly prohibited.
3. The exercise of the incidental authority mentioned is prohibited by section 3152 of the Revised Statutes, as amended by the second section of the act of March 1, 1879.

4. The prohibition is so broad that neither the Secretary nor the Commissioner of Internal Revenue can appoint any person to make such investigation, except such agents as are authorized by section 3152 of the Revised Statutes as amended, or those authorized under section 3463 for detecting violations of the internal-revenue laws.
5. A clerk in the Treasury Department cannot, as a general rule, be detailed for duty away from Washington by any authority but that of the Secretary of the Treasury.

There are separate classes of statutes involved in the questions arising upon the facts hereafter stated.

I. One class contains these provisions:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." (Rev. Stats., 161.)

"The Secretary of the Treasury shall, * * * superintend the collection of the revenue; * * * " (Rev. Stats., 248.)

"The Secretary of the Treasury shall make and issue from time to time such instructions and regulations to the several collectors, receivers, depositaries, officers, and others who may receive Treasury notes, United States notes, or other securities of the United States, or who may be in any way engaged or employed in the preparation and issue of the same, as he shall deem best calculated to promote the public convenience and security, and to protect the United States, as well as individuals, from fraud and loss; he shall prescribe forms of entries, oaths, bonds, and other papers, and rules and regulations, not inconsistent with law, *to be used under and in the execution and enforcement of the various provisions of the internal-revenue laws*, or in carrying out the provisions of law relating to raising revenue from imports, or to duties on imports, or to warehousing; he shall give such directions to collectors and prescribe such rules and forms to be observed by them as may be necessary for the proper execution of the law; he shall also prescribe the forms of the annual statements to be submitted to Congress by him showing the actual state of commerce and navigation between the United States and foreign countries, or coastwise between the collection districts of the United States, in each year." (Rev. Stats., 251.)

"There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who shall be appointed by the President, by and with the advice and consent of the Senate, * * * ." (Rev. Stats., 319.)

"The Commissioner of Internal Revenue, under the direction of the Secretary of the Treasury, shall have general superintendence of the assessment and collection of all duties and taxes now or hereafter imposed by any law providing internal revenue; and shall prepare and distribute all the instructions, regulations, directions, forms, blanks, stamps, and other matters pertaining to the assessment and collection of internal revenue; * * * ." (Rev. Stats., 321.)

Internal-revenue collectors are appointed in various districts of the United States. (Rev. Stats., 3141-3145.)

II. The statute authorizes the employment of thirty-five internal-revenue agents for the performance of such duties under the direction of any internal-revenue officer, or such other special duty as the Commissioner of Internal Revenue may deem necessary, and declares that no other general or special agent or inspector in connection with the in-

ternal revenue shall be appointed except certain inspectors specially authorized.*

These internal-revenue agents are paid from annual appropriations for their salaries, and are under instructions assigned to the duty of examining collectors' offices.†

* Section 3152 of the Revised Statutes as amended by section 2 of the act of March 1, 1879, is as follows:

"SEC. 3152. The Commissioner of Internal Revenue may, whenever in his judgment the necessities of the service so require, employ competent agents, not exceeding at any time thirty-five in number, to be paid such compensation as he may deem proper, not exceeding in the aggregate any appropriation made for that purpose; and he may, at his discretion, assign any such agent to duty under the direction of any officer of internal revenue, or to such other special duty as he may deem necessary; and no general or special agent or inspector, by whatever designation he may be known, of the Treasury Department in connection with the internal revenue, except inspectors of tobacco, snuff, and cigars, and except as provided for in this title, shall be appointed, commissioned, employed, or continued in office.

"The agents whose employment is authorized by this section shall be known and designated as internal-revenue agents, and they shall have all the powers of entry and examination conferred upon any officer of internal revenue, by sections thirty-one hundred and seventy-seven, thirty-two hundred and seventy-seven, thirty-two hundred and eighty-six, and thirty-three hundred and eighteen of the Revised Statutes;

"And all the provisions of said sections, including those imposing fines, forfeitures, penalties, or other punishments for the enforcement thereof, are hereby made applicable to the action of internal-revenue agents, in the same manner as if such agents were specially named in each of said sections.

"And all the provisions of sections thirty-one hundred and sixty-seven, thirty-one hundred and sixty-eight, thirty-one hundred and sixty-nine, and thirty-one hundred and seventy-one of the Revised Statutes shall apply to internal-revenue agents as fully as to internal-revenue officers."

† The act of March 3, 1881 (21 Stat., 395), appropriates, in the usual form of prior appropriations, for the fiscal year 1882:

"For salaries and expenses of agents [the thirty-five] and surveyors, for fees and expenses of gaugers, for salaries of storekeepers, and for miscellaneous expenses, two million one hundred thousand dollars."

By joint resolution of June 30, 1882, and others since, this appropriation was continued to and including August 4.

The "Internal Revenue Manual, compiled by direction of the Commissioner of Internal Revenue from the laws and regulations now in force for the information and guidance of internal-revenue agents and officers, August 1, 1879," under the caption, "Examination of collectors' offices," says:

"The accounts of collectors and such of their deputies as have a money responsibility will be examined by agents detailed for that purpose and assigned to that duty by special orders of the Commissioner.

"Agents in charge of districts will not be expected to make a formal examination of collectors' offices unless specially directed and authorized so to do.

"Whenever an agent has reason to believe that the interests of the public service demand an immediate examination of a collector's office, he will without delay advise this office by telegraph and ask for instructions.

"Agents assigned to the duty of examining collectors' accounts will make such examinations only as are directed by the Commissioner. It is the intention to have the accounts of each collector in the country examined as often as once a quarter, and to so arrange assignments that each examination during the year will be made by a different agent. The object of these examinations is primarily to ascertain if the public money intrusted to collectors has been promptly and accurately accounted for, to verify the reports and returns made to this office, and thus to determine as to the fidelity and integrity of the collector, and, secondarily, to inspect the condition of the office-records; to ascertain the business qualifications of the collector and his subordinates; to see that the districts are properly organized; that the affairs of the office are conducted in an economical manner, with a view to the faithful collection of the revenue, and with a proper regard to the rights and convenience of tax-payers."

III. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to expend money appropriated for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same in cases where such expenses are not otherwise provided for.*

* The statute is as follows :

"SEC. 3463. The Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, is authorized to pay such sums, not exceeding in the aggregate the sum appropriated therefor, as he may deem necessary for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at the same, in cases where such expenses are not otherwise provided for by law."

This section was compiled from the act of March 2, 1867, sec. 7 (14 Stat., 473); and the act of June 19, 1878 (20 Stat., 187), provides in respect of the moneys appropriated that—

"The Commissioner of Internal Revenue shall make a detailed statement to Congress once in each year as to how he has expended this sum."

Under this law circulars offering rewards to informers were issued, No. 99, Department No. 83, Internal Revenue, July 17, 1872, revised as Department No. 107, July 31, 1873, and again revised as Department No. 161, December 1, 1875, as follows:

[CIRCULAR NO. 99—SECOND REVISION.]

CONCERNING REWARDS FOR INFORMATION LEADING TO THE DETECTION AND PUNISHMENT OF PERSONS VIOLATING INTERNAL-REVENUE LAWS.

1875.
Department No. 161. }
Internal Revenue.

TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, December 1, 1875.

Under and by virtue of the provisions of the three thousand four hundred and sixty-third section of the Revised Statutes of the United States, as enacted June 22, 1874, which authorize the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, to pay such sums as he may deem necessary, not exceeding in the aggregate the sum appropriated therefor, for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws, or conniving at violations of the same, in cases where such expenses are not otherwise provided for by law, I do hereby, with the approval of the Secretary of the Treasury, offer for information given by persons other than officers of internal revenue, or persons appointed or employed in, or acting in connection with the internal-revenue service, that shall lead to the detection and punishment of persons guilty of violating the internal-revenue laws, or conniving at the same, whether such punishment be by fine, or other pecuniary mulct or penalty, or by forfeiture of property, such reward as the Commissioner of Internal Revenue may deem suitable, but in no case exceeding ten per centum of the net amount of the fines, penalties, forfeitures, and taxes, which, by reason of said information, shall be recovered by suit or otherwise and actually paid to the United States, or of any sum which shall be accepted in compromise by the Commissioner of Internal Revenue and received by the United States; such rewards to be paid in cases which are settled in court, upon the duly-authenticated certificate of the United States District Attorney having charge of the case or cases, that the person claiming is the person who furnished the information which led to the detection and punishment of the violations of law for which the recovery was had, and upon such other and additional proofs as the Commissioner may require.

In cases in which property seized, being of the appraised value of five hundred dollars or less, is disposed of by the Collector under the provisions of section 3460 of the Revised Statutes, the certificate of the Collector to that fact will be received, and also to the fact that the person claiming the reward is the person who furnished the information leading to such forfeiture.

The rewards hereby offered must be understood to be limited in their aggregate to the sum appropriated therefor.

This offer will apply to cases in which the information has been or shall be given on or after the first day of December, 1875.

Approved:

B. H. BRISTOW, *Secretary of the Treasury.*

D. D. PRATT,
Commissioner.

Annual appropriations have been regularly made for the payment of the expenses of detecting and bringing to trial and punishment violators of the internal-revenue laws, including payments for information and detection.*

June 27, 1882, the Commissioner of Internal Revenue, by letter to B. H. Collins, a clerk in his office, directed him "to make an examination and report to this office upon Form 188 as to the condition of the offices of" "collectors" therein named, to "make an accurate count of all stamps * * * and the public money in the hands of the collector and his deputies," and to commence his work June 30. The clerk performed the duties assigned him, and his bill of traveling and hotel expenses, \$91.35, was approved July 18, by the Commissioner of Internal Revenue, and on July 19, the Fifth Auditor made a statement of the account, and a report to the First Comptroller, on which the account is adjusted payable out of the appropriation for salaries and expenses of agents, &c., [for miscellaneous expenses].

The question is presented whether this appointment was authorized, and the expenses a proper charge to be paid.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The inquiries presented require a consideration of several questions.

The Secretary of the Treasury, as incident to the authority given him by law, may, upon general principles in the law of agency, appoint agents to investigate the official transactions of collectors of internal revenue, and the condition of their offices. He is the head of the Treasury Department (Rev. Stats., 233); he is required "to superintend the collection of the revenue" (Rev. Stats., 248), to issue instructions and regulations for the execution and enforcement of the revenue laws (Rev. Stats., 251), and by many provisions is charged with the duty of supervising and conducting the fiscal operations of the government. The general powers thus given include as incidental thereto the authority to appoint agents to make the investigations stated when he deems them necessary to the due execution of the laws. The statute recognizes this general authority. (Rev. Stats., 183, 3681.) It is a principle in the law of official as of private agency, that when the means are not

In practice agents are also appointed directly, or authority is given by letter of the Commissioner to internal-revenue agents respectively "to employ" a designated person for a fixed time and on a prescribed compensation "for the purpose of assisting you [him] in the discovery of violations of internal-revenue laws."

* The appropriation for the fiscal year 1882 is in the usual form, as follows:

"For detecting, and bringing to trial and punishment, persons guilty of violating the internal-revenue laws, or accessory to the same, including payments for information and detection, seventy-five thousand dollars; and the Commissioner of Internal Revenue shall make a detailed statement to Congress once in each year as to how he has expended this sum; and also a detailed statement of all miscellaneous expenditures in the Division of Internal Revenue for which appropriation is made in this act." (Act March 3, 1881, 21 Stat., 395.)

This is made to carry out the provision of section 3463 of the Revised Statutes.

Bills for expenses are allowed by the Commissioner and approved by the Secretary.

prescribed by which a duty is to be performed, or authorized object attained, the authority to use the requisite, usual, and proper means is implied. "In statutes incidents are always supplied by intendments." (*Quando lex aliquid concedit, concedere videtur et id, per quod devenitur ad illud.* (Potter's Dwarrior, 123; *United States v. Macdaniel*, 7 Pet., 1; *Gratiot v. United States*, 15 *Id.*, 336; *Inspectors' Case*, 1 Lawrence, Compt. Dec., 2d ed., 201; *Swamp-Land Case*, 2 *Id.*, 138; 4 Op. Att. Gen., 248.) If the Secretary of the Treasury deems it advisable to appoint a clerk in the department as such agent, his authority to do so has been fully settled. The necessities of the service may require the skill which such agent may have. In the service required he acts as special agent, not as clerk. (*Bender's Case*, 1 Lawrence, Compt. Dec., 2d ed., 317; *Bender's Case*, second *Ib.*, 400.) But the incidental authority arising in the manner stated may be taken away by legislation.

1. If specific provision, ample and plenary, be made by statute for the service stated, this will be deemed exclusive, and there can be no incidental authority to exercise. (*Birch's Case*, 1 Lawrence, Compt. Dec., 154.)

2. An express statutory prohibition or provision may, of course, restrain or limit the power which would otherwise arise by implication, or as incidental to principal authority.

The statute does not in words or name contain specific plenary and exclusive provision, necessarily or especially for the service in question, and hence, there is, thus far, no exclusion of the incidental authority mentioned. But it does make provision for thirty-five internal-revenue agents (Rev. Stats., 3152 as amended), and they may be, and are, under regular standing instructions, assigned to the larger part of the kind of service in question. If it be said that the authority to appoint such agents is in the Commissioner of Internal Revenue, and that the assignment to such service rests in his discretion, and even that the Secretary of the Treasury cannot control such appointments or assignments—a question not necessary to be decided—the statute nevertheless has declared that "no [other] general or special agent or inspector, by whatever designation he may be known, of the Treasury Department in connection with the internal revenue, * * * shall be appointed, commissioned, employed, or continued in office." This prohibition is very general and comprehensive. The rule of construction is well understood that "what is generally spoken shall be generally understood, unless it be qualified by some special subsequent words." (Broom, Leg. Max., 647.) The general language of the statute might be restrained to apply only to the Commissioner, and not to the Secretary, but for the full and explicit language that its prohibition applies to all agents "of the Treasury Department." It is not possible to give effect to the clear and comprehensive words of the prohibition, without requiring it to limit all other general authority to appoint agents. There is no room for a construction *in pari materia* which can permit a different result. The words of the prohibition have some purpose to which effect must be given. The

sole question then is this: Is a clerk in the department, when assigned to the duty in question, a "general or special agent or inspector * * * in connection with the internal revenue," within the meaning of the prohibitory statute? It is clear he is such agent.

A clerk when assigned to the duty of examining the office of a collector acts as special agent, and not in his official character as clerk. This is clear from (1) the place of service, (2) the character of the service, and (3), but for the prohibition contained in section 3152 of the Revised Statutes as amended by the act of March 1, 1879, the authority under which he might act.

1. The statute declares that "There shall be at the seat of government [Washington, D. C.] * * * the Department of the Treasury," (Rev. Stats., 233), and that "There shall be in the department" (Rev. Stats., 235), certain clerks therein specified, including those in the office of the Commissioner of Internal Revenue. The Commissioner is an officer, and has an office "in the Department of the Treasury" (Rev. Stats., 319), and this "shall be [is] at the seat of Government." (Rev. Stats., 233.) The same principle is recognized in other provisions. (Rev. Stats., 166, 171, 173, 174.) The fourth section of the act of August 5, 1882 (22 Stat., 255), shows that clerks in the Departments at Washington are to be employed therein, and only at the service which properly belongs to clerks as such. It is as follows:

"SEC. 4. That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services, and after the first day of October next section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees at a different rate of pay or in excess of the numbers authorized by appropriations made by Congress, be, and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered

into the Treasury: *Provided*, That the sums herein specifically appropriated for clerical or other force heretofore paid for out of general or specific appropriations may be used by the several heads of departments to pay such force until the said several heads of departments shall have adjusted the said force in accordance with the provisions of this act; and such adjustment shall be effected before October first, eighteen hundred and eighty-two. And in making such adjustment the employees herein provided for shall, as far as may be consistent with the interests of the service, be apportioned among the several States and Territories according to population: *Provided further*, That any person performing duty in any capacity as officer, clerk, or otherwise in any department at the date of the passage of this act who has heretofore been paid from any appropriation made for contingent expenses or for any contingent or general purpose, and whose office or place is specifically provided for herein, under the direction of the head of that department may be continued in such office, clerkship, or employment without a new appointment thereto, but shall be charged to the quotas of the several States and Territories from which they are respectively appointed and nothing herein shall be construed to repeal or modify section one hundred and sixty-six of the Revised Statutes of the United States."

It is not doubted that a clerk in the Treasury Department may, even as such, be required to perform some services away from Washington pertaining to his duties as clerk, or necessary to enable him or other clerks to perform duties in the Department. This might be incidental to the official clerical duties required by law. But this by no means reaches duties having no connection with clerical services.

2. The character of the service shows that it does not pertain to the office of clerk. The general duties of a clerk are well understood. Bouvier says, the term clerk when applied to officers means "a person employed in an office, public or private, for keeping records or accounts. His business is to write or register in proper form the transactions of the tribunal or body to which he belongs." He then says: "Some clerks, however, have little or no writing to do in their offices: as the clerk of the market, whose duties are confined to superintending the market." It is nowhere intimated that the investigation of the affairs of a distant office pertain to the office of clerk. Such investigations have by general usage been deemed as services of a special agent. On the 19th September, 1843, the Secretary of War, desiring to investigate charges incidentally tending to implicate persons employed by the government in carrying on intercourse with Indian tribes, asked the Attorney-General if the expenses could be paid "of a special agent or commissioner" to make the investigation. (Swamp Land Case, 2 Lawrence, Compt. Dec., 138.) The Attorney-General (4 Op., 248) held that "the executive department, being charged with the duty of seeing that the laws are faithfully executed, has authority to appoint commissioners and agents to make investigations required by acts of Congress." The terms employed are "commissioners and agents." The service is regarded as that of an agent, not of a clerk. The fact that it may be rendered by an agent who holds no office indicates clearly that it is not an official duty.

3. The authority of law, under which the duties could be performed but for the prohibition already mentioned, is wholly different from that requiring official clerical service. Section 183 of the Revised Statutes provides that:

"Any officer or clerk of any of the Departments lawfully detailed to investigate frauds or attempts to defraud on the government, or any irregularity or misconduct of any officer or agent of the United States, shall have authority to administer an oath to any witness attending to testify or depose in the course of such investigation."

This does not by its terms give authority to detail clerks to investigate frauds, but it was enacted in view of the fact that other statutes then did, and generally would, authorize such detail. Here this section refers to clerks "lawfully detailed," clearly implying that the detail is to be in pursuance of some other statute. Such details are generally made under the implied or incidental authority of the Secretary of the Treasury, arising out of the duty imposed by statutes to perform some official act. (4 Op., 248; Eveleth's case, 2 Lawrence, Compt. Dec., 20.) The authority to make the detail in this case, were it not for the prohibition already mentioned, would be found in the power of the Secretary "to superintend the collection of the revenue" (Rev. Stats., 248), to issue instructions and regulations for the execution and enforcement of the revenue laws (Rev. Stats., 251), the appropriation "For detecting, and bringing to trial and punishment, persons guilty of violating the internal-revenue laws" (21 Stat., 395), and other provisions giving general power in relation to revenues and revenue officers. This is recognized by the fact that the expenses of clerks so detailed have been paid out of an appropriation "for salaries and expenses of agents * * * and for miscellaneous expenses." No clerk has ever been paid *expenses* while performing his duties as such in any department. These miscellaneous expenses are such as relate to the internal-revenue service away from Washington, and especially those of agents. (Act March 3, 1881, 21 Stats., 395). And expenses are only payable to those who render service contemplated by this appropriation act, which does not apply to clerks as such. The fact that a detail to this special service is made in writing shows that it is not required as a part of the official duties of a clerk. The duties of a clerk are, or may be, performed under "regulations" of the Secretary (Rev. Stats., 161); the chief clerk is authorized to distribute the duties of clerks (Rev. Stats., 174; act March 3, 1853, sec. 3, 10 Stat., 209), the Deputy First Comptroller has duties as to clerks (Rev. Stats., 173, 174; act of March 3, 1875, sec. 2, 18 Stat., 396, 398) in the First Comptroller's Office; the chief clerk in the office of the Commissioner of Internal Revenue has a similar duty (Rev. Stats., 173, 174); but none of the chief clerks exercise any control over special agents, though they are frequently appointed as special agents. All this shows that the duties of clerks rest upon, and are authorized by, wholly different statutes from those under which special agents act. It is clear that the duties under consideration may be, and generally are, performed by the

thirty-five authorized internal-revenue agents. They are then acting in the line of duty as agents, and in a service not belonging to clerks in the Department. They are appointed for a service different from that for which clerks are appointed. The duty of investigating the offices of collectors of internal revenue belongs either to the one or the other of two classes, (1) agency, or (2) clerical. It cannot belong to both. When provision is made adequate and plenary for this service through internal-revenue agents, it is, on general principles, to be deemed the only and exclusive authorized provision. (Birch's case, 1 Lawrence, Compt. Dec., 154.)

Since the act of August 5, 1882, section 4, and after October 1, 1882, no clerk or employé "in any of the executive departments, * * * at the seat of government," can be employed "except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress." The effect is, that clerks exist only in offices created by act of Congress, and not by creation of the head of a department to carry out the purposes of any appropriation act for any object. Special agents, on the contrary, can be so appointed to render services requisite away from the seat of government under such acts. The service now in question is to be performed away from Washington, and falls within the range of duties of agents. There is no specific authority to detail a clerk to the service in question. There is, in the absence of the restraining statute, implied authority to appoint an agent or detail a clerk as such for this service. If a clerk be detailed, it is by virtue of the authority to employ agents, and not of the power to appoint or direct clerks. In view of all this, it may be fairly concluded that there is no authority to detail a clerk for this service. The general prohibition referred to (Rev. Stats., 3152) does not interfere with the appointment of agents "for detecting and bringing to trial and punishment persons guilty of violating the internal-revenue laws." They are authorized by section 3463 of the Revised Statutes. This section is *in pari materia* with section 3152; both are to be construed together, and effect given to both, so that neither one may restrict the operation of the other. By the general rule of construction each section should be held to have a purpose not covered by the other. (Huidekoper's Case, 2 Lawrence, Compt. Dec., 2d ed., 354; s. c., 3 Lawrence, Compt. Dec., 155; Hardcastle, Statutory Law 83, 109; Pretty v. Solly, 26 Beav., 606; De Winton v. Brecon, 28 L. J., Ch., 604; Churchill v. Crease, 5 Bingham, 180.) This cannot always be done as to these sections, because under section 3152 agents may be assigned to any duty which the Commissioner "at his discretion * * * may deem necessary." Whatever doubt might have existed as an original question as to the proper construction, it is settled, as stated, by usage and by appropriations made by Congress. Agents may, therefore, be appointed under both sections, though possibly sometimes acting for the same purposes, but *official* or *quasi official* duties required of agents under section 3152 cannot, as a general rule, be performed by employés under section 3463.

Under the statutes applicable generally, a clerk in the Treasury Department cannot be detailed for any duty away from Washington, except by authority of the Secretary. The statute authorizes clerks for duty in the department, and no statute has given the head of a bureau authority to assign them to duty elsewhere. The exercise of such power is utterly inconsistent with the authority of the Secretary to "prescribe regulations * * * for the * * * conduct of clerks" and "the performance of business" (Rev. Stats., 161); inconsistent with his authority to "alter the distribution among the various bureaus * * * of the clerks" (Rev. Stats., 166); destructive of the duties required of clerks "in the Department" (Rev. Stats., 162, 163, 169, 235, 236) "at the seat of Government." (Rev. Stats., 171, 233; act of August 5, 1882, sec. 4.)

The history and course of legislation in relation to the execution of the internal-revenue laws show that ample provision has always been made for the examination of collectors' offices without a special detail of clerks for that purpose.

Section 4 of the act to provide internal revenue, &c., approved June 30, 1864 (13 Stat., 224), authorized the Secretary of the Treasury to *appoint* not exceeding five *revenue agents* "whose duties shall be, under the direction of the Secretary of the Treasury, to aid in the prevention, detection, and punishment of frauds upon the internal revenue, and in the enforcement of the collection thereof * * *." These agents were to be paid "in addition to the expenses necessarily incurred by them" compensation or salary "not exceeding two thousand dollars per annum." The act of March 3, 1865 (13 Stat., 469), amended this section so as to authorize the appointment of ten revenue agents.

Section 5 of said act of 1864 authorized the Secretary of the Treasury to "appoint *inspectors* in any assessment district when in his judgment it may be necessary for the purpose of the proper enforcement of the internal revenue laws or the detection of frauds," and it was therein provided that "such inspectors and revenue agents aforesaid shall be subject to the rules and regulations of the said secretary, and have all the powers conferred upon any other officer of internal revenue *in making any examination of persons, books, and premises which may be necessary in the discharge of the duties of their office*". And that "the compensation of such inspectors shall be fixed and paid for such time as they may be actually employed, not exceeding four dollars per day, and their just and proper travelling expenses."

These provisions show that the agents and inspectors referred to were to be employed in the prevention and detection of fraud on the internal revenue; and they have always been construed as authorizing these officers to enter premises, and to examine books and persons in respect of taxable business, trades, or articles. These officers were thus clothed with plenary express power to examine collectors' offices. And if by any rule of construction it could be held the statutes did not give express power, it is clear that the Secretary of the Treasury might

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specially instruct any such agent or inspector to examine and report on the condition of a collector's office. The authority to so instruct and thus to examine would be manifestly incidental to the general powers given. Hence the practice arose of making, by a designated agent or agents, occasional administrative examinations into the manner of transacting business in the several offices of collectors of internal revenue.

In addition to these agents and inspectors, other inspectors, and in some cases assistant inspectors, were, under section 58 of the act of June 30, 1864, and section 29 of the act of July 13, 1866, appointed by the Secretary of the Treasury at every distillery established according to law. The duties of these officers were similar to those now performed by storekeepers and gaugers at distilleries and distillery warehouses. Section 30 of the act of July 13, 1866, authorized the Secretary to appoint in addition to these inspectors one or more "general inspectors of spirits," in "every collection district where the same shall be necessary." These general inspectors performed duties similar to those performed by gaugers, as well outside as inside of distillery premises. Under said sections, 58 and 29, the Secretary of the Treasury appointed wherever the same was necessary in any collection district one or more inspectors of "refined coal oil or other oil, tobacco, cigars, and other articles."

Under the act of 1864 these inspectors, and also inspectors of spirits, were compensated by fees prescribed by the Commissioner of Internal Revenue, and paid by the owner or manufacturer of the articles inspected. Under the act of 1866 distillery inspectors were paid five dollars a day and fees on spirits inspected, which per diem and fees were assessed on and paid by the distillers. The act of March 2, 1867, section 17 (14 Stat., 481), repealed the authority to appoint distillery inspectors. It required the general inspectors to inspect, gauge, and mark spirits before removal from distilleries, and imposed the other duties of distillery inspectors upon "such other duly appointed officers as may be [were] designated by the Commissioner of Internal Revenue." So remained the law until the passage of the act of July 20, 1868. Section 49 of the act authorized the Secretary of the Treasury, on the recommendation of the Commissioner of Internal Revenue, to appoint not exceeding twenty-five officers, to be called supervisors of internal revenue. This section placed the supervisors under the direction of the Commissioner, and imposed upon them the duties performed by the revenue agents and inspectors provided for in sections 4 and 5 of the act of June 30, 1864; and in addition thereto the duty "*to examine into the efficiency and conduct of all officers of internal revenue within his [such supervisor's] district;*" and in addition to this duty it conferred on the supervisors the power to transfer or suspend from duty when considered necessary, within their district, any inspector, gauger, or storekeeper; and section 51 authorized them in case of fraud or gross neglect of duty to suspend from duty any collector or assessor within their respective supervisorial districts.

Sections 23 and 24 of the act provided for the appointment by the Secretary of the Treasury of storekeepers—one or more at each bonded or distillery warehouse, and such number of gaugers of distilled spirits as might be necessary—the former to be paid by the United States not exceeding five dollars a day, and the latter, by fees prescribed by the Commissioner of Internal Revenue, the aggregate monthly fees being limited to the rate of three thousand dollars per annum, which fees were paid to the collectors by the owners or producers of the articles gauged, and by the collectors to the gaugers. Section 50 provided for the *employment* by the Commissioner of Internal Revenue of “competent detectives, not exceeding twenty-five in number” to be assigned to such detective duty under the direction of the supervisors, or such other special duty as the Commissioner might deem necessary. Then it was provided in the same section that after July 30, 1868, “no general or special agent, or inspector, by whatever name or designation he may be known, of the Treasury Department in connection with the internal revenue, except inspectors of tobacco, snuff and cigars, and except as provided for in this [that] act, shall be appointed, commissioned, employed, or continued in office, and the term of office or employment of all such general or special agents or inspectors * * * shall expire ten days after this act shall take effect.”

Taking into consideration this prohibition, and the sections of the internal-revenue laws to which it relates, and the fact that ample provision is made to examine collectors' offices, and that Congress intended to prevent all abuses of the power to appoint agents, it is reasonable to conclude that the purpose of this legislation was to abolish the offices of agents and inspectors appointed under sections 4 and 5 and 58 of the act of June 30, 1864, and sections 29 and 30 of the act of July 13, 1866, except inspectors of tobacco and cigars, and all special agents of whatever character. The language of the prohibition is so broad and general that it comprehends all. If the purpose of Congress had been simply to limit the number of officers, or quasi officers, specifically named in the internal-revenue laws, that purpose would have been accomplished by prescribing the number. The prohibition in general terms must be construed as having some other purpose than that which was already accomplished by a limitation of the number of officers and agents. And to limit the *number* of officers and agents, and to allow clerks to be detailed as agents without limit, would render nugatory and of no avail the general prohibition.

The act of June 6, 1872 (17 Stat., 230), amending sections 49 and 50 of the act of 1868, reduced the number of supervisors to ten, and changed the title of the detectives employed under section 50 to that of “agents.” The duties of agents were the same as those prescribed for the detectives. The act of August 15, 1876 (19 Stat., 152), repealed the law under which supervisors of internal revenue were appointed, and conferred upon the Commissioner of Internal Revenue the power of transfer and suspension vested in the supervisors. The act of March 1, 1879 (20 Stat., 329),

authorized the Commissioner of Internal Revenue to employ not exceeding thirty-five agents and contained the same prohibition in respect of the employment of additional agents as that provided in the act of July 20, 1868. (Rev. Stats., 3152.)

It appears to have been the intention of Congress that all duties to be performed, and all services to be rendered in the several collection districts, are to be performed or rendered by the local officers therein or by the revenue agents. This can be gathered from the following sections of the Revised Statutes:

SEC. 1790. No officer or clerk whose duty it is to make payments on account of the salary or wages of any officer or person employed in connection with the customs or the internal-revenue service, shall make any payment to any officer or person so employed on account of services rendered, or of salary, unless such officer or person so to be paid has made and subscribed an oath that, during the period for which he is to receive pay, neither he, nor any member of his family, has received, either personally or by the intervention of another party, any money or compensation of any description whatever, nor any promises for the same, either directly or indirectly, for services rendered or to be rendered, or acts performed or to be performed, in connection with the customs or internal revenue; or has purchased, for like services or acts, from any importer, if affiant is connected with the customs, or manufacturer, if affiant is connected with the internal-revenue service, consignee, agent, or custom-house broker, or other person whomsoever, any merchandise, at less than regular retail market prices therefor.

SEC. 3171. If any officer appointed under and by virtue of any act to provide internal revenue, or any person acting under or by authority of any such officer, shall receive any injury to his person or property, *in the discharge of his duty*, under any law of the United States for the collection of taxes, he shall be entitled to maintain suit for damage therefor, in the circuit-court of the United States, in the district wherein the party doing the injury may reside or shall be found.

SEC. 3169. Every officer or agent appointed and acting under the authority of any revenue law of the United States—

First. Who is guilty of any extortion or willful oppression under color of law; or,

Second. Who knowingly demands other or greater sums than are authorized by law, or receives any fee, compensation, or reward, except as by law prescribed, for the performance of any duty; or,

Third. Who willfully neglects to perform any of the duties enjoined on him by law; or,

Fourth. Who conspires or colludes with any other person to defraud the United States; or,

Fifth. Who makes opportunity for any person to defraud the United States; or,

Sixth. Who does or omits to do any act with intent to enable any other person to defraud the United States; or,

Seventh. Who negligently or designedly permits any violation of the law by any other person; or,

Eighth. Who makes or signs any false entry in any book, or makes or signs any false certificate or return, in any case where he is by law or regulation required to make any entry, certificate, or return; or,

Ninth. Who, having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such

knowledge or information to his next superior officer and to the Commissioner of Internal Revenue; or,

Tenth. Who demands, or accepts, or attempts to collect, directly or indirectly, as payment or gift, or otherwise, any sum of money or other thing of value for the compromise, adjustment, or settlement of any charge or complaint for any violation or alleged violation of law, except as expressly authorized by law so to do, shall be dismissed from office, and shall be held to be guilty of a misdemeanor, and shall be fined not less than one thousand dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years. The court shall also render judgment against the said officer or agent for the amount of damages sustained in favor of the party injured, to be collected by execution. One-half of the fine so imposed shall be for the use of the United States, and the other half for the use of the informer, who shall be ascertained by the judgment of the court.

By long-settled construction of section 1790 and the usage thereunder, no clerk in the internal-revenue bureau of the Treasury Department is regarded as an officer or person employed in connection with the internal-revenue *service*. If such clerks could be lawfully employed in the internal-revenue service, no payment of salaries could be made to them while so employed, unless they qualified in the mode prescribed in the section. Again, such clerks are not "appointed under and by virtue of any act to provide internal revenue," nor do they render service to the government "under the authority of any revenue law of the United States"; they are appointed by the Secretary of the Treasury, under the second section of the appropriation act of March 3, 1875 (18 Stat., 371, 398), providing for the "organization of the Treasury Department, and the several offices thereof"; hence, they are not within the provisions of sections 3169, 3171. Congress evidently intended that *internal-revenue service* was to be rendered by officers appointed under and by virtue of internal-revenue acts, or by officers or agents appointed and acting under the authority of a revenue act. The revenue acts provide for the appointment or employment of such officers and agents—the number of the latter is expressly limited to thirty-five. Having so provided it is clear that there is no authority to employ a clerk in the Treasury Department to perform any *internal-revenue service*. If such employment were lawful Congress would certainly have included such clerks, when so employed, in the provisions of sections 1790, 3169, and 3171 of the Revised Statutes, and the fact that they were not so included is conclusive that there is no lawful authority for employing them in performing any duty which pertains to any officer or agent in the internal-revenue service.

In any view of the subject it is impossible to find any authority to detail clerks to investigate collectors' offices.

Where a construction of a statute has prevailed which sanctioned an expenditure, and on the authority of this an expenditure has been made, it would be a hardship to refuse its payment. No payment can be made of expenses hereafter incurred in such cases as this.

TREASURY DEPARTMENT,

First Comptroller's Office, August 14, 1882.

The expenses of the 35 revenue agents, *ante*, 243, are reported on vouchers the forms of which are prescribed as follow:

(Form 132—Revised May, 1877.)

INTERNAL-REVENUE AGENT'S MONTHLY EXPENSE ACCOUNT.

The United States (Office of Internal Revenue),

APPROPRIATION:

To _____, Dr.

P. O. Address: _____

	Dollars.	Cts.
For actual necessary expenses incurred and paid as per itemized statement annexed, as internal-revenue agent, during the month of _____, 188-.....		
.....		
.....		
.....		
.....		

Received payment,

Internal-Revenue Agent.

_____, being duly sworn, deposes and says that the above account is just and true in all respects; that the services as charged have been actually rendered; that the distances as charged have been actually and necessarily travelled at the dates therein specified; that none of such distances have been travelled under any free pass on any railroad, steamboat, or other conveyance; that the expenses above charged have been actually incurred and paid at the rates therein specified; that during the time for which said account is rendered the deponent has not attended court as a witness or in any other capacity for which attendance he has received any pay whatever, or for which he expects to receive any compensation otherwise than as above charged; and further, that all the services charged herein were necessarily rendered and the expenses necessarily incurred and paid in his official capacity as revenue agent.

Internal-Revenue Agent.

Sworn to and subscribed before me this _____ }
day of _____, A. D. 188 . }

Correct:

Chief of Division of Internal-Revenue Agents.

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF INTERNAL REVENUE,
_____, 188 .

Approved for _____ ¹⁰⁰ dollars,
(\$ _____ .)

Commissioner.

The accounts under the appropriation for miscellaneous expenses are made on a form prescribed as follows:

(FORM 131.)

MISCELLANEOUS EXPENSE ACCOUNT.

THE UNITED STATES, (Office of Internal Revenue,)

APPROPRIATION:

To

, Ir.

P. O. Address:

Dollars. Cts.

For expenses incurred and paid, as per itemized statement annexed, during the period from the _____ day of _____ to the _____ day of _____, 188 , both inclusive, as per authority given by the Commissioner of Internal Revenue, dated _____, 188

Received payment.

_____, being duly sworn, deposes and says that the above account is just and true in all respects; that the services as charged have been actually rendered; that the distances as charged have been actually and necessarily traveled at the dates therein specified; that none of such distances have been traveled under any free pass on any railroad, steamboat, or other conveyance; that the expenses above charged have been actually incurred and paid at the rates therein specified; that during the time for which said account is rendered the deponent has not attended court as a witness or in any other capacity for which attendance he has received any pay whatever, or for which he expects to receive any compensation otherwise than as above charged.

Sworn and subscribed before me this _____

day of _____, A. D. 188 .

Official title: _____

TREASURY DEPARTMENT,

OFFICE OF INTERNAL REVENUE,

, 188 .

APPROVED for
(\$ _____)

100 dollars

Commissioner.

APPROVED:

Secretary.

ITEMIZED STATEMENT OF ACTUAL AND NECESSARY EXPENSES.

NOTE.—If this account embraces traveling expenses, this statement must show the distances traveled, the places visited, and the expenses incurred on each day on which expenses are charged. Every item of expense exceeding one dollar, except for travel by public conveyance, must be attended by its proper voucher. Hotel bills must state the time and rate per diem. If the account embraces payments for services of others than the person rendering this account, a voucher, on Form 10, must be

furnished in each case. Vouchers should be numbered, and the number entered in the proper column opposite the date.

Date.	No. of voucher.	Amounts.
		\$

The indorsements are made thereon on a prescribed blank form, as follows.

DIVISION OF ACCOUNTS.

(FORM 131.)

ACCOUNT OF

FOR

Period from _____, 188 ,
to _____, 188 .

Office of Commissioner of Internal Revenue,
_____, 188 .

Respectfully referred to the Secretary of the Treasury.

Deputy Commissioner.

Office of the Secretary of the Treasury,
_____, 188 ,

Respectfully referred to the Fifth Auditor of the Treasury.

Chief Clerk.

NOTE BY THE FIRST COMPTROLLER.

The legislative, executive, and judicial appropriation bill, for the fiscal year ending June 30, 1884, as passed by the House of Representatives, was reported February 23, 1883, to the Senate by the Committee on Appropriations, with an amendment as shown in *italics* in the following provision:

“For salaries and expenses of agents and surveyors, for fees and expenses of gaugers, for salaries of storekeepers, and for miscellaneous expenses, *including traveling expenses of such officers and clerks as shall be detailed for special service by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury; and the fees earned by a gauger during any one month may be averaged so as to include every day in which he is actually employed in gauging, or in duties connected therewith, or in traveling in the performance of duty,* two million three hundred thousand dollars.”

This amendment in *italics* was struck out in the Senate February 24, 1883, and the bill passed without it. It will thus be seen Congress did not give authority to detail clerks.

IN THE MATTER OF THE PAYMENT OF INFORMER'S MOIETIES UNDER SECTION 1174 OF THE REVISED STATUTES RELATING TO THE DISTRICT OF COLUMBIA.—INFORMER'S CASE.

1. The offense of keeping within the District of Columbia an "office or place of business for the sale of lottery-tickets," as defined by section 1174 of the Revised Statutes relating to the District of Columbia, is not abolished by the act of April 29, 1878 (20 Stat., 39).
2. Informers, as to offenses which still exist under so much of said section 1174 as is not superseded by the act of April 29, 1878, are entitled to a moiety of fines collected under sentences for such offenses.
3. When an appropriation has been made by Congress for the purpose, informers under this section are to be paid by the Commissioners of the District of Columbia on an itemized voucher, approved by the auditor of the District, with evidence (1) that they were the informers, and (2) that a fine has been collected under this section and paid into the Treasury of the United States.
4. The District appropriation acts, making appropriations for the "detection of crime," constitute an appropriation for the payment of such moieties.
5. The police court of the District has no power to order payment to an informer.
6. Bundy's Case (1 Lawrence, Compt., 134), re-examined and affirmed.
7. An officer or employé in the public service with compensation fixed by law or regulations is not entitled to pay as an informer.
8. There are among others three principal modes of repealing a statute—(1) by express repeal, (2) by the enactment of such repugnant provision on the same subject that both statutes cannot stand together, and (3) by a subsequent statute revising the whole subject, and covering the same objects.

The Revised Statutes relating to the District of Columbia, containing the acts of Congress in force December 1, 1873, provide:

"SEC. 1174. It shall not be lawful to keep within the District any office or place of business for the sale of lottery tickets, or of any share or interest in lottery-tickets, nor shall it be lawful to sell or offer for sale within the District any lottery-ticket or any share or interest in any lottery-ticket; and every person who shall be duly convicted of offending against the provisions of this section shall be punished by imprisonment in the District jail for a period not less than one nor more than six months, and shall forfeit and pay a fine of not less than one hundred nor exceeding one thousand dollars, one-half of which shall go to the informer and the other half to the District."

"SEC. 1079. All fines, penalties, costs, and forfeitures imposed or taxed by the police court shall be collected by the marshal, or by the major of police, as the case may be, on process ordered by the court, and by them paid over to the District."

The act of April 29, 1878 (20 Stat., 39), provides:

"That if any person shall, within the District of Columbia, keep, set up, or promote, or be concerned as owner, agent, clerk, or in any other manner, in managing any policy-lottery or policy-shop, or shall sell or transfer any ticket, certificate, bill, token, or other device purporting

or intended to guarantee or assure to any person, or entitle him to a chance of drawing or obtaining a prize, or share of, or interest in, any prize to be drawn in any lottery, or in the game or device commonly known as policy-lottery or policy; or shall, for himself or another person, sell or transfer, or have in his possession, for the purpose of sale or transfer, or shall aid in selling, exchanging, negotiating, or transferring a chance or ticket in, or share of a ticket in, any policy-lottery, or any such bill, certificate, token, or other device, he shall be deemed guilty of a misdemeanor, and upon conviction thereof, shall forfeit and pay a fine of not more than five hundred dollars, or be imprisoned in the District jail not less than two months or more than one year or both in the discretion of the court."

"SEC. 2. That if any person shall knowingly permit in any house under his control, in the District of Columbia, the sale of any chance or ticket in or share of a ticket in any lottery or policy-lottery, or shall knowingly permit any lottery or policy-lottery or policy-shop in such house, he shall be deemed guilty of a misdemeanor, and, upon conviction thereof shall be fined not less than fifty dollars or more than five hundred dollars, or be imprisoned in the District jail not less than two months or more than one year, or both, in the discretion of the court."

The organic act of the District of Columbia, June 11, 1878 (20 Stat., 105), provides that:

"All taxes collected shall be paid into the Treasury of the United States, and the same, as well as the appropriations to be made by Congress as aforesaid [for one-half the expenses of the District], shall be disbursed for the expenses of said District, on itemized vouchers, which shall have been audited and approved by the auditor of the District of Columbia, certified by said Commissioners, or a majority of them; and the accounts of said Commissioners, and the tax-collectors, and all other officers required to account, shall be settled and adjusted by the accounting-officers of the Treasury Department of the United States."

The act of March 3, 1879 (20 Stat., 410), provides that:

"All moneys appropriated under this act, together with all revenues of the District of Columbia from taxes or otherwise, shall be deposited, to the credit of the Treasurer of the United States, in the Treasury, * * *, and shall be drawn therefrom upon requisition of the Commissioners of the District of Columbia, * * *; and the accounts for all disbursements shall be made monthly to the accounting officers of the Treasury * * *."

The act of March 3, 1881 (21 Stat., 466), contains a similar provision.

June 17, 1882, the marshal of the District of Columbia addressed a letter to the First Comptroller, saying, that "parties who have become informers in lottery cases before the police court of this District have, upon certificates of the clerk of said court, made application for one-half the fines collected in such cases;" and asking an opinion, whether his accounts, as marshal, for fines collected in said police court "will be allowed to include such disbursements and receipts taken therefor entered to his credit."

The marshal of the District of Columbia is a disbursing officer. (1 Lawrence, Compt. Dec., App., Ch. xv, 624, 626.)

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The act of April 29, 1878, creates new offenses in relation to policy-lotteries, policy-shops, &c. It re-enacts some of the provisions of section 1174 of the Revised Statutes relating to the District of Columbia, defining crimes, especially that in regard to selling lottery-tickets, and it enlarges the provisions of this section. It does not provide for moieties to informers, as does section 1174; and, so far as this section is superseded by the act of April 29, 1878, informers are not entitled to moieties. Their services are provided for by appropriations for "detection of crime"—District appropriation act of March 3, 1881 (21 Stat., 463). This is an appropriation sufficiently comprehensive to pay informers.

The act of April 29, 1878, leaves unchanged and in force that provision of said section 1174 which defines the offense of keeping "within the District any office or place of business for the sale of lottery-tickets," &c. As to this offense, or any punishment by fine for the same under this section, informers are entitled to a moiety; for the section provides, as to fines, that one-half "shall go to the informer." This provision is not expressly repealed, nor is there any repeal by implication. The act of April 29, 1878, is not so far a revision of the crimes statutes as to operate as a repeal of the provision of section 1174 making it an offense to keep within the District an office for the sale of lottery-tickets, nor of the provision of said section giving moieties to informers upon conviction of persons of such offense. In 1 Richardson's Supplement to the Revised Statutes, published 1881, page xiv, this section, 1174, is not mentioned as one "altered, affected, or repealed by legislation," since the revision; but a portion of it may be superseded by the act of April 29, 1878—that is, the provision making it penal "to sell or offer for sale within the District any lottery-ticket or any share or interest in any lottery-ticket"—because this seems to be provided for in said act. The only fine, therefore, which can be imposed for the last offense is that prescribed—not by section 1174, but by the act of April 29, 1878. The provision of section 1174 for a moiety as to this offense must necessarily fall by the repeal, because no fine upon conviction of it can any longer be imposed under this section, out of which the moiety can be paid.

The residue of section 1174, above printed in italics, does not seem to be superseded or repealed by implication. There are, among others, three principal modes of repeal—(1) by express repeal, (2) by the enactment of such repugnant provision on the same subject that both statutes cannot stand together, and (3) by a subsequent statute revising the whole subject, and covering the same objects. There is no express repeal of section 1174, and no absolute repugnance as to the clauses mentioned. (Bishop, *Written Laws*, 157–162; *United States v. Tynen*, 11 Wall., 92; *Henderson's Tobacco*, 11 Wall., 657.) The only ground upon which a repeal can be claimed is, that the act of April 29, 1878, is

a "revision of [the] whole subject" embraced in section 1174, and so a repeal by implication of the whole section. The rule in such case has been thus stated: "Where two acts are not in express terms repugnant, yet if the latter *covers the whole subject of the first*, and embraces new provisions, *plainly showing* that it was intended as a substitute for the first act, it will operate as a repeal of that act." (United States v. Tynen, 11 Wall., 92.) This repeal occurs when the subjects and objects of both statutes are the same. (United States v. Claffin, 97 U. S., 546.)

Bishop, in his new and valuable work "On the Written Laws," says: "The just doctrine is, that, without exception, a statute in affirmative terms, with no intimation of an intent to repeal prior laws, does not repeal them, unless the new and the old are irreconcilably in conflict." (Sec. 160.) And he says no such repeal takes place "when the legislative body makes what on its face is a mere addition to the laws, employing no negative words and saying nothing of repeal." (Sec. 161.) In such cases of different statutes a repeal by implication takes place "only to the extent of the repugnance." (Bishop, Written Laws, 152; Elrod v. Gilliland, Howell & Co., 27 Ga., 467; Henderson's Tobacco, 11 Wall., 657.) Upon these authorities and many others which may be cited, it is clear there is no total repeal of section 1174.

If the act of April 29, 1878, stood alone, and section 1174 of the Revised Statutes relating to the District of Columbia had not been enacted, keeping an "office or place of business for the sale of lottery-tickets, or of any share or interest in lottery tickets" within the District of Columbia, would not constitute an offense against the laws of Congress relating to the District. Hence, not expressly repealing, being repugnant to, or embracing, that provision in said section 1174, which previously enacted, that "it shall not be lawful to keep within the District any office or place of business for the sale of lottery-tickets, or of any share or interest in lottery-tickets" it does not operate as a repeal thereof; so, not operating as a repeal of so much of said section 1174 as created this new offense, it does not repeal that portion of said section which prescribed a fine and penalty for such offense, "one-half of which shall go to the informer and the other half to the District."

The inquiry then arises how shall the informer be paid? It is clear that, when an appropriation has been made by Congress for the purpose, he is to be paid by the Commissioners of the District on an itemized voucher approved by the Auditor of the District, with evidence, (1) that he was the informer, and (2) that a fine has been collected under this section and paid into the Treasury of the United States. The fine is a part of the revenues of the District. Section 1079 of the Revised Statutes relating to the District requires all fines imposed by the police court to be collected and paid over to the District. The act of March 3, 1879, requires that "all revenues of the District * * * from taxes or otherwise," shall be paid into the Treasury of the United States. All the recent District appropriation acts contain this provision. The

act of June 11, 1878, and other acts cited, require all these revenues to be "disbursed for the expenses of said District, on itemized voucher, * * * approved by the Auditor of the District." It necessarily follows that the marshal of the District cannot, out of a fine collected, pay the informer. The police court has no power to direct the payment, and it does not appear that it is charged with the duty of finding who the informer is. In adopting this mode of payment, the prevailing usage is followed. The Revised Statutes relating to the District of Columbia provided:

"Sec. 1080. The moneys collected upon the judgments of the police court, or so much thereof as may be necessary, shall be applied to the payment of the salaries of the judge and other officers of the court, * * *."

For a time these salaries were paid by the marshal out of this fund without any appropriation act. (Bundy's Case, 1 Lawrence, Compt. Dec., 184). This was done, either upon the theory that fines collected by the police court, not being money in the Treasury of the United States, might be applied in the manner stated, or upon the theory that this section was itself an appropriation act. The latter proposition cannot be maintained. (Canal Case, 1 Lawrence, Compt. Dec., 141; Bundy's Case, *Id.*, 184; Conger's Case, 2 *Id.*, 2d ed., 36). The former proposition as to money of the United States is open to question. Fines imposed by the police court belong to the revenues of the District, but, by force of the statutes, are to be paid into the Treasury of the United States, and can only be paid out by authority of an appropriation act. Since the act of March 3, 1879, requiring "all revenues of the District" to be paid into the Treasury of the United States, and in connection with the act of June 11, 1878, requiring all revenues to "be disbursed for the expenses of said District, on itemized voucher, * * * approved by the auditor of the District," the marshal has made no disbursement for salaries from fines so collected, and has no authority to do so. These acts have been regarded as modifying the effect of section 1080 above cited. This section is not inserted in Richardson's Supplement to the Revised Statutes as one "altered, affected, or repealed by legislation" since the revision, but it is modified as above stated.

An officer or employé in the public service with compensation fixed by law or regulations is not entitled to pay as an informer. (Revised Stat., 1765.) The marshal will be advised that he cannot make any payment to informers.

TREASURY DEPARTMENT,

First Comptroller's Office, August 24, 1882.

IN THE MATTER OF THE PAYMENT OF CLAIMS WHEN THE STATUTE APPROPRIATING MONEY FOR THE PURPOSE CONTAINS A FALSE DESCRIPTION OF THE CLAIMS OR THE CLAIMANTS.—FALSE-DESCRIPTION CASE.

1. When a claim or a claimant mentioned in an appropriation act is falsely described therein, or has a false description thereto appended, such description may be rejected; and, if there remain a sufficient description to identify the claim and the claimant, and a purpose in the act to make payment, it may lawfully be made.
2. The maxim, *falsa demonstratio non nocet, cum de corpore constat*, generally applies as well in the construction of statutes as in other cases.
3. The maxim applied, and payment authorized: I. In the case of an appropriation "to refund to the sureties of C. H. Davis, late postmaster at Vernon Springs, Alabama," there being no such place as "Vernon Springs," but said Davis being sufficiently identified as late postmaster in Alabama. II. In the case of an appropriation to pay (1) John W. Spencer, (2) certified claim, No. 3705, (3) for horse lost in the military service (4) the sum of \$150 (5) allowed by the Fourth Auditor and Second Comptroller, when, in fact, (1) Spencer had no claim, and (2) the Fourth Auditor had no jurisdiction of such claims, but in other respects the claim was correctly described, and the certificate numbered 3705 in the Treasury Department showed \$150 due Kate R. Bowdish.

The following is taken from the act of Congress of August 5, 1882 (22 Stat., 257, 261, 281, 282, 283):

AN ACT making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with section four of the act of June fourteenth, eighteen hundred and seventy-eight, heretofore paid from permanent appropriations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter stated, namely:

To enable the Secretary of the Treasury to refund to the sureties of C. H. Davis, late *postmaster at Vernon Springs, Alabama*, the amount collected upon a judgment of court in excess of the actual amount due the United States from said postmaster, as appears of record in the office of the Auditor of the Treasury for the Post-Office Department, seven hundred and thirty-one dollars and seven cents.

SEC. 3.—That for the payment of the following supplemental list of claims, which are fully set forth in House Executive Document Number Two hundred and two, Forty-seventh Congress, first session, and are allowed by the accounting officers of the Treasury under the fourth section of the act of June fourteenth, eighteen hundred and seventy-eight, since January fourteenth, eighteen hundred and seventy-two, transmitted by letter of Secretary of the Treasury of May fifteenth, eighteen hundred and eighty-two, there be appropriated as follows:

CLAIMS ALLOWED BY THE THIRD AUDITOR AND SECOND COMPTROLLER.

For horses and other property lost in the military service, for same period, fifteen thousand four hundred and eighty-two dollars and sixty-nine cents.

The House executive document referred to in the foregoing section, contains a schedule of claims allowed under the caption, with descriptions of claims shown, as follows:

Amounts allowed by the accounting officers of the Treasury Department.
ALLOWED BY THE FOURTH AUDITOR AND SECOND COMPTROLLER, UNDER SECTION 4, ACT OF JUNE 14, 1878.

No. of certificate or claim.	Name of claimant.	Appropriation from which payable	Fiscal year in which the expenditure was incurred.	Amount.	Total.	Remarks.
WAR DEPARTMENT. CLAIMS.						
3192	James Shaw.....	Horses and other property lost in the military service of the United States prior to June 1, 1879 (sections 3482 to 3489, Revised Statutes).	1861...	\$101 75		
3669	Mary J. Spann, widow of Thomas Spann, deceased.	do	1864...	140 00		
3706	John W. Spencer	do	1863...	180 24		
3705	do	do	1864 ..	150 00		
3752	Margaret Washburn, widow of Hiram Washburn, deceased.	do	1865...	128 75		

Claims "for horses and other property lost in the military service" are allowed by the Third Auditor and Second Comptroller. Among the claims so allowed was one in favor of Kate R. Bowdish, the balance due as certified by certificate No. 3705 being \$150, for a horse "lost in the military service." The certificate No. 3705 appears in the schedule above under the caption of claims "allowed by the Fourth Auditor and Second Comptroller," when it should have been under the caption of claims allowed by the Third Auditor and Second Comptroller, and the name of the claimant is not in the schedule, but is indicated by a "do." under the name of "John W. Spencer."

August 17, 1882, the Secretary of War made a requisition on the Secretary of the Treasury, asking that he will "cause a warrant for \$150 to be issued in favor of Kate R. Bowdish due on settlement as per certificate of Second Comptroller No. 3705, to be charged to" appropria-

tions for "horses and other property lost in the military service prior to July 1, 1879." There is a memorandum thereon as follows: "This case is reported on page 29 of House Ex. Doc. No. 202, 47th Cong., 1st Sess., as 'do.' under the name of John W. Spencer."

In relation to the claim first above mentioned in the appropriation act in favor of "C. H. Davis, late postmaster at Vernon Springs, Alabama," it is to be observed, there is no such post-office as "Vernon Springs" in Alabama, but there is a post-office at Union Springs, Ala., at which place C. H. Davis, whose sureties are the claimants, was postmaster, and there has been no other person by the name of C. H. Davis as postmaster in Alabama.

The First Comptroller is asked to decide, whether warrants can lawfully issue for the payment of these claims.

—

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The questions presented relate to two claims.

The act of August 5, 1882, appropriated \$731.07 in favor of "the sureties of C. H. Davis, late postmaster at Vernon Springs, Alabama." If it is competent to admit evidence to show that there is no such post-office as "Vernon Springs" in Alabama, and that C. H. Davis was postmaster at Union Springs, Ala., and not elsewhere, and then, upon this evidence, to reject the false description in the statute "at Vernon Springs," and then give effect to the remaining words of the statute, payment can lawfully be made to the sureties named. So, as to the claim of Kate R. Bowdish; if it is competent to show—(1) that the Second Comptroller's certificate No. 3705 was in her favor, and thus contradict the effect of the abbreviation "do." under the name of "John W. Spencer" as payee, and (2) that her claim was allowed by the Third Auditor and thus locate it under the proper caption in the schedule correcting the false description in the caption—and then give effect to the appropriation act and schedule as each are thus corrected, the claimant can be paid. The law as to each case is this: It is competent to show the errors mentioned, not for the purpose of thus giving effect, either to the statute or the schedule as corrected, but simply for the purpose of rejecting the false descriptions. If, when the false descriptions are thus rejected, a sufficient description remains to identify the claims and claimants, and to clearly indicate a purpose on the part of Congress to make appropriations for their payment, they may be paid. Thus Greenleaf, *Evidence*, Vol. 1, sec. 301, in discussing the admissibility of parol evidence to explain a written instrument, so as to correct a false demonstration or description, and apply such instrument to its proper subject, says:

There is another class of cases, * * * *, namely, those in which, upon applying the instrument to its subject-matter, it appears that in relation to the subject, whether person or thing, the description in it is

true in part, but not true in every particular. The rule, in such cases, is derived from the maxim—*Falsa demonstratio non nocet, cum de corpore constat*.* Here so much of the description as is false is rejected; and the instrument will take effect, if a sufficient description remains to ascertain its application. It is essential, that enough remains to show plainly the intent. "The rule," said Mr. Justice Parke,† "is clearly settled, that when there is a sufficient description set forth of premises, by giving the particular name of a close, or otherwise, we may reject a false demonstration; but, that if the premises be described in general terms, and a particular description be added, the latter controls the former."

(See *Clinton v. Englebrecht*, 13 Wall., 448; *United States v. Bradley*, 10 Pet., 343.)

The reason and policy of the principles thus stated apply as well in the exposition of statutes as in written instruments relating to real or personal property. In Potter's *Dwarris on Statutes and Constitutions* (178) it is said, in effect, that generally the same rules applicable "to the construction of deeds and wills, hold good in the construction of statutes"; and Sedgwick, *Construction Stat., and Const. L.*, 2d ed., 354, says, "the maxim, *falsa demonstratio non nocet*, applies to statutes as well as in other cases."

The two claims under consideration may lawfully be paid, and warrants may lawfully issue therefor.

TREASURY DEPARTMENT,

First Comptroller's Office, August 26, 1882.

IN THE MATTER OF THE PER DIEM FEE OF CIRCUIT COURT COMMISSIONERS IN CASES BEFORE THEM, WHEN THERE IS NO "HEARING AND DECIDING ON CRIMINAL CHARGES," BUT ONLY AS TO CONTINUANCE.—COMMISSIONERS' PER DIEM CASE.

1. A circuit court commissioner is not entitled to a per diem fee merely for the continuance of the hearing of a criminal charge by reason of the absence of witnesses, or for other cause.

The Revised Statutes (sec. 847) provide, as to fees of commissioners of circuit courts, that they shall be entitled to receive—

"For hearing and deciding on criminal charges, five dollars a day for the time necessarily employed."

The question is presented to the First Comptroller to decide, whether a United States commissioner is entitled to a per diem fee, when a party

* "6 T. R. 676; Broom's Maxims, p. 269 [629]; Bac. Max. Reg. 25. And see Just. Inst. lib. 2, tit. 20, § 29. *Si quidem in nomine, cognomine, prænominē, agnomine legatarii, testator erraverit, cum de persona constat, nihilominus valet legatum; idemque in heredibus servatur; et rectè: nomina enim significandorum hominum gratiā reperta sunt; qui si alio quolibet modo intelligantur, nihil interest.*

† "Doe d. Smith v. Galloway, 5 B. & Ad. 43, 51."

charged with crime is brought before him on a warrant of arrest, and by reason of the absence of witnesses, or for other cause, the case is continued for hearing to a future day, without "hearing and deciding" on the criminal charge.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Prior to 1866 no per diem fee was allowed when the hearing of a criminal charge before a commissioner was merely continued for cause shown. At that time section 4 of the act of August 16, 1856 (11 Stat., 49), gave a right of appeal from the decision of the accounting officers to the Secretary of the Interior. On an appeal to the Secretary the assistant, as Acting Secretary, held, that a commissioner in such cases was entitled to the per diem fee. (See Comptroller's letter to Secretary, April 7, 1866, and Assistant Secretary's reply thereto, April 19, 1866.)

The provisions of the fourth section of the act of August 16, 1856, were impliedly repealed by the act of March 30, 1868 (15 Stat., 54; 14 Op. Att. Gen., 104). The Acting Secretary relied on the analogy of allowances to district attorneys, and cited 9 Opinions of Attorneys-General, 170. But that opinion relates exclusively to cases where, before warrants of arrest are issued, the district attorney goes before the commissioner, makes the accusation, and produces his witnesses, or a sufficient number of them to make out a reasonable *prima facie* case. If such a practice now obtains, it is confined to a very few judicial districts.

The printed instructions to commissioners, issued by the judge of the United States district court for the western district of North Carolina, May term, 1880, contain the following:

"No per diem charge must be made by a commissioner when a case is merely continued, as such charge is only allowable for the days actually and necessarily occupied in hearing and determining a case."

And the circuit court of the United States for the district of Kentucky made the following rule, October 31, 1882:

"When a commissioner continues a case the reasons for such continuance must be entered on his record, and stated in his report of trial sent to the court. No per diem charge must be made by a commissioner when a case is merely continued, as such charge is only allowable for the days actually and necessarily occupied in hearing and deciding a case."

These rules are sustained by the law. The language of the statute scarcely needs construction. It gives a per diem fee "for hearing and deciding on criminal charges." This does not give a fee for time occupied in postponing the hearing, or in hearing and deciding the question whether a continuance shall be had. In such case the question decided does not relate to the criminal charge; it is simply whether the criminal charge shall then be considered.

When an accused party is brought before a commissioner, and the latter is required, on a showing, to decide only whether the examination or hearing shall be postponed or continued to the next or a subse

quent day, and the accused is for this purpose committed, or admitted to bail, this is simply a hearing and deciding as to a continuance of the criminal charge, for which no per diem fee is provided. When the commissioner enters into a hearing of the criminal charge, and decides to admit to bail, or commit the accused for further hearing, thus continuing the case—as for further evidence—to the next or a subsequent day, he is entitled to the per diem fee of \$5 for “the time necessarily employed,” allowed by section 847 Revised Statutes.

No fee can be allowed for a continuance of the hearing, when no question but that of the continuance is entered into or decided.

TREASURY DEPARTMENT,

First Comptroller's Office, August 31, 1882.

IN THE MATTER OF WHO IS ENTITLED TO THE SALARY DUE A PUBLIC OFFICER AT THE DATE OF HIS DECEASE, AND TO THE RESIDUE OF ONE YEAR'S SALARY ALLOWED BY CONGRESS TO THE WIDOW OF SUCH DECEASED OFFICER.—GARNET'S CASE.

1. The salary due a public officer at the date of his decease must be paid to his legal representative—the proper executor or administrator.
2. Under the Constitution, Congress has no power, after the decease of a public officer, to provide by law for the payment to the widow of the deceased of the salary due him at the time he died.
3. It is a rule in construing statutes, that when the language thereof admits of two interpretations, one conformable to, and the other in conflict with, the Constitution, the former is to be adopted.
4. On general common law principles no testamentary disposition of the salary due a public officer at the date of his decease can be made, which will deprive his legal representative—the proper executor or administrator—of the right to payment thereof.
5. The private joint resolution of Congress of August 1, 1882, “for the relief of Sarah J. S. Garnet,” does not apply to the salary due Henry H. Garnet at the time of his decease.
6. When an act of Congress gives a gratuity to the widow of a deceased public officer, it is payable to her, and not to the legal representative of the deceased.
7. The residue of “one year's salary” given by the joint resolution of Congress of August 1, 1882, to the widow of Henry H. Garnet, late minister of the United States to Liberia, is such gratuity, and is payable to her, and not to the legal representative of the deceased.

Henry H. Garnet was commissioned minister resident and consul-general of the United States to Liberia June 30, 1881, with an annual salary of \$4,000. He was allowed from July 1 to July 30, 1881, inclusive, for salary while receiving instructions, \$326.09. He remained in the United States without being entitled to salary to November 20, 1881, when he departed for his post of duty in Liberia, where he died February 13, 1882. His salary due from November 20, 1881, to February 13, 1882, was \$945.41.

Thus his total salary to Feb. 13, 1882, was $\$326.09 + \$945.41 = \$1,271\ 50$. He was by his drafts on the State Department debited respectively—

July 30, 1881	\$326 09
December 31, 1881	500 01

Total paid....	826 10	826 10
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Leaving balance salary due.....	\$445 40
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The residue of "one year's salary," for the payment of which no provision is made by any general law, would be \$2,728.50.

In pursuance of section 1749 of the Revised Statutes, and section 48 of the Consular Regulations of 1881, there was paid June 6, 1882, to Sarah J. S. Garnet, widow of the deceased minister, \$444.45, as and for "a sum of money equal to the allowance now made to such officer [deceased minister] for the time necessarily occupied in making the transit from his post of duty to his residence in the United States." The general consular and diplomatic appropriation act approved February 24, 1881 (21 Stat., 339), makes appropriation for the payment of the salary due the minister at his decease, \$445.40, and for the widow's allowance, \$444.45. The "legal allowances" mentioned in the joint resolution following are contingent expenses, including rent, stationery, postage, &c., authorized to be paid under section 1748 of the Revised Statutes, and the general act referred to of February 24, 1881, makes an appropriation to cover them. The legal representative of the deceased has not presented any claim for these, nor was any presented by the minister.

Congress passed a joint resolution August 1, 1882 (22 Stat., Private Laws and Resolutions, 100), as follows :

JOINT RESOLUTION for the relief of Sarah J. S. Garnet, widow of Henry H. Garnet late minister to Liberia.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That there be appropriated, out of any money in the Treasury not otherwise appropriated, to be paid to Sarah J. S. Garnet, widow of Dr. Henry H. Garnet, late minister of the United States to Liberia, one year's salary as said minister in addition to all legal allowances, deducting the amount of salary by said Henry H. Garnet, since the date of his appointment.

Approved, August 1, 1882.

It is represented that the deceased left a last will and testament giving his property to persons other than his widow. The proper papers are presented to the First Comptroller to decide :

I. To whom shall the balance of salary due, \$445.40, be paid ?

II. To whom shall the residue of the "one year's salary," \$2,728.50, under the joint resolution be paid ?

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The two questions stated will be disposed of separately. The right to receive payment of each of the two sums mentioned is to be considered as affected or determined by—(1) general principles of law, (2) the joint resolution of Congress, and (3) testamentary disposition, if any, by the deceased.

I. The balance of salary due Henry H. Garnet at the time of his decease is to be paid to his legal representative—the proper executor or administrator.

1. This is required by general principles of law.

By the common law, as it now exists, the widow of a decedent, who owned chattels or choses in action, acquires no title therein. Her rights, whatever they may be, are inchoate, and generally can be reached only through the executor of a testator or the administrator of an intestate. In most, if not all of the States, provision is made by statute for securing to every widow a year's support from the estate of her husband, and a distributive share of the estate in cases of intestacy, or, upon her election, in lieu thereof, such provision as may be made by his last will and testament. But the title or estate in the chattels and choses in action of the decedent is vested in the proper executor or administrator, who alone can recover possession of chattels and dispose of the same, maintain actions, or otherwise collect money due on choses in action, and execute acquittances therefor. The writ *de rationabili parte bonorum* is unknown in American practice. These principles are well settled and established in American legislation and common law. (Williams, *Executors*, 6th Am. ed., [2], [629], [786], [1799]; *Rockwell v. Saunders*, 19 Barb., 473; *Bellinger v. Ford*, 21 Barb., 311.) The right of the legal representative of the deceased is thus sufficiently established on general principles of law.

2. The joint resolution of Congress cannot change this result.

At common law the right of action in choses in action vests in an executor from the moment of the testator's death, and in an administrator only from the grant of letters of administration, though for some purposes the title of the latter, when vested, relates back to the time of the death of the intestate. (1 Williams, *Executors*, 6th Am. ed., [631].)

"A vested right of action is property." (Cooley, *Const. Lim.*, 4th ed., [362]; *Osborn v. Nicholson*, 13 Wall., 662).

The Constitution prohibits Congress from divesting any vested right of property. (Const., Art. V, Amendments; Paschal, *An. Const.*, 3d ed., 472, *note* 488; Cooley, *Const. Lim.*, 4th ed., [176]; *Withers v. Buckley*, 20 How., 84; *Fletcher v. Peck*, 6 Cranch, 87; *Steamship Co. v. Joliffe*, 2 Wall., 450.) The Constitution in this respect is declaratory of the common law, and is an express limitation on legislative power. (Paschal, *An. Const.*, 3d ed., 473, *note* 488; *Sinnickson v. Johnsons*, 2 Harr. N. J., 129; *Gardner v. Newburgh*, 2 Johns. Ch., 162; *Pumpelly*

v. Green Bay Co., 13 Wall., 166; *Cooley*, Const. Lim., 4th ed., [176], [362].) If, therefore, the joint resolution of Congress in terms undertook to direct payment of the salary due Garnet at his death to his widow, it would, *pro tanto*, be unconstitutional and void. But the resolution has no such purpose. It is a rule of construction, that, when the language of a statute admits of two interpretations, the one shall be adopted which would make it conform to the Constitution. (*Cooley*, Const. Lim., 4th ed., [178]; *Duncombe v. Prindle*, 12 Iowa, 1).

The resolution makes an appropriation of the money to be paid the widow. As there is a prior general appropriation of money to pay the salary due, the resolution is clearly applicable only to the gratuity of the residue of "one year's salary" which it gives to the widow. The resolution, therefore, does not apply to the salary due Garnet at his decease.

3. No testamentary disposition of the salary due Mr. Garnet at his decease can deprive his legal representative of the right to payment thereof, unless some statute specifically authorizes it. The rights of legatees are derived from the legal representative of the deceased, because the law vests such representative with the legal title to assets, and this is necessary to secure the prior rights of creditors of the estate. Thus it is said: "That as the whole personal estate is liable in the hands of the executor to the payment of the debts of the testator, the executor must take care to discharge them, before he satisfies any description of legacy." (2 Williams, Executors, 6th Am. ed., [1016], [1224], [1340]; *Garnet v. Macon*, 6 Call, 308; s. c., 2 Brock., C. C., 185.) Hence, the right of the legal representative of the deceased to payment of the salary due him at the date of his decease is not affected by any testamentary disposition thereof. Such legal representative, if any balance remains after satisfying creditors, must of course pay the same to the legatees or distributees entitled.

II. The residue of "one year's salary," \$2,728.50, under the joint resolution of Congress is payable directly to Sarah J. S. Garnet, widow. It is a gratuity given by Congress directly to the widow. There is no general principle of law which can give to the legal representative of the deceased any claim thereto. Congress, the donor, has by express law given it to the widow, and required payment to her. It cannot be affected by any testamentary disposition made by Henry H. Garnet, because he never had any right thereto. (*Heirs of Emerson v. Hall*, 13 Pet., 409; *Ogden v. Strong*, 2 Paine, C. C., 585.)

Payment of this sum must be made directly to the widow. Payment of the salary due Garnet at the date of his death must be made to his legal representative—the proper executor or administrator.

TREASURY DEPARTMENT,

First Comptroller's Office, October 18, 1882.

H. Ex. 219—18

IN THE MATTER OF REPAYMENT OF INTERNAL-REVENUE INCOME TAX
TO CITIZENS OF TENNESSEE—JORDAN'S CASE.

1. The act of July 29, 1862 (22 Stat., Private Laws, 77), authorizes the repayment to certain "named citizens of Tennessee" of "the amount of taxes * * * collected * * * contrary to the provisions of the regulations issued by the Secretary of the Treasury," and then specifies the amount to be repaid to each person named therein. In fact, one-half of the amount so specified, as to many of said persons, was not collected contrary to, but in accordance with, the provisions of the regulations. *Held:*
 - (1) The intention of Congress was to refund only the amount of taxes collected contrary to the provisions of the regulations—to repair a wrong done to citizens, and not to do a wrong to the government.
 - (2) In such case of two conflicting provisions in the statute, as to the amount to be refunded, one fixing a rule of computation, and the other stating the amount contrary to such rule, the one fixing a rule of computation must be adopted, and the other stating the erroneous amount must be rejected, because—(1) This carries out the intention of Congress, which is the first and controlling element in construing the statute. (2) This is required by the rule that when there are two descriptions given to identify an object, one correct, one erroneous, the former shall be adopted, the latter rejected. (3) It is required by the rule of construction that some effect shall, if practicable, be given to every provision of a statute. If the stated amounts in this statute control, then no effect can be given to the words which require a refunding only of amounts collected contrary to the regulations. But if effect be given to the rule of repayment only of amounts collected contrary to the regulations, there still remains a sufficient effect for the provisions which name the amounts, the persons to be repaid, and their residences, by holding that they exclude all other persons, and, perhaps, limit the maximum to be refunded to each. (4) This result is the more reasonable, as it is not probable that Congress intended to adjust and settle accounts, this not ordinarily being an exercise of legislative power.
 - (3) The general rule of construction, that a thing given in particular shall not be taken away by general words, is subordinate to and controlled by the higher rule, that the intention of the law-making power is to govern in the construction of statutes.
 - (4) A statute which merely "authorized" the payment of a sum of money by the Secretary of the Treasury is not mandatory.

By the internal-revenue act of July 1, 1862 (12 Stat., 473, Sec. 91), the annual income tax for the year 1863 was due and payable May 1, 1864. May 5, 1864, an internal-revenue assessor was appointed for the second collection district of Tennessee. August 30, 1864, an assistant assessor was appointed for an "assessment division" then established comprising Rutherford County in this district.

By the joint resolution of July 4, 1864 (13 Stat., 417), the special 5 per cent. war tax on incomes of 1863 became due and payable October 1, 1864.

June 6, 1865, Edward L. Jordan, of Rutherford County, paid the proper collector \$2,290, of which \$1,145 was for annual income tax on his in-

come for 1863, and \$1,145 was for the special 5 *per cent.* war tax on income of 1863.

June 21, 1865, the Secretary of the Treasury issued special circular No. 16, containing the following among other regulations:

Section 46 of the internal-revenue act, approved June 30, 1864, [13 Stat., 240] provides that whenever the authority of the United States shall have been re-established in any State where the execution of the laws had previously been impossible, the provisions of the act shall be put in force in such State, with such modification of inapplicable regulations in regard to assessment, levy, time and manner of collection, as may be directed by the department.

Without waiving in any degree the rights of the government in respect to taxes that have heretofore accrued, or assuming to exonerate the tax-payer from his legal responsibility for such taxes, the department does not deem it advisable to insist at present upon their payment, so far as they were payable prior to the establishment of a collection district embracing the territory in which the tax-payer resides.

But assessors in the several collection districts recently established in the States lately in insurrection are directed to require returns, and to make assessments for the several classes of taxes for the appropriate legal period preceding the first regular day on which a tax becomes due after the establishment of the district—that is to say, in the several districts in question the proper tax will be assessed upon the income of the year 1864, inasmuch as the tax for that year is due upon the thirtieth day of June, subsequently to the establishment of the district. All persons found doing any business for which a license is required will be assessed for the proper license from the first day of the month in which the district is established.

* * * * *

In the States of Virginia, Tennessee, and Louisiana, collection districts were sometime since established, with such boundaries as to include territory in which it has but recently become possible to enforce the laws of the United States. In those districts, the rule laid down above will be so modified as to require the assessment and collection of the first taxes which become due after the establishment of assessment divisions in the particular locality. * * *

July 29, 1882, the following act of Congress was passed:

AN ACT for the relief of citizens of Tennessee.

Be it enacted, * * * That the Secretary of the Treasury be, and he is hereby, authorized and directed to remit, refund, and pay back, out of any moneys in the Treasury not otherwise appropriated, to the following named citizens of Tennessee, or the legal representatives of such as are deceased, the amount of taxes assessed upon and collected from the said named persons contrary to the provisions of the regulations issued by the Secretary of the Treasury under date of June twenty-first, eighteen hundred and sixty-five, and published in special circular numbered sixteen from the Internal Revenue Office of that date, said refunding having been recommended by the Secretary of the Treasury *

* The following is the letter referred to:

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
Washington, June 19, 1873.

SIR: I have considered the claim of William Gosling and others, applicants for refunding taxes alleged to have been illegally collected, included in Schedule No. 243,

under date of June nineteenth, eighteen hundred and seventy-three, that is to say:

To William Campbell, eight dollars and ninety-six cents; to Thomas Dean, forty-seven dollars and sixty cents; to J. B. Dixon, thirteen dollars and thirty-six cents; * * * [and many other persons named with specified amounts] * * *; to Edward L. Jordan, two thousand two hundred and ninety dollars; * * * to Joseph Watkins, thu [three] hundred and eighty-four dollars; all of Rutherford County, Tennessee. To Asa Faulkner of Warren County, Tennessee, two thousand seven hundred dollars; * * * said persons, and each of them, having filed their claims in the office of the Commissioner of Internal Revenue prior to the sixth of June, eighteen hundred and seventy-three.

September 6, 1882, the Commissioner of Internal Revenue transmitted a schedule of the claims under this act to the Secretary of the Treasury, and September 11, 1862, the Acting Secretary directed "the payment of the several sums specified" in the schedule "in accordance with said act." The sums specified in the schedule are those named in the act. They were reported by the Fifth Auditor to the First Comptroller.

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Opinion by WILLIAM LAWRENCE, *First Comptroller* :

The annual income tax of \$1,145 was due and payable May 1, 1864, but the "assessment division" for its collection was not established until August 30, 1864. The circular No. 16 only required the collection of "taxes which become due after the establishment of assessment divisions." This sum of \$1,145, having become due before the establishment of the proper assessment division, was "collected * * * contrary to the provisions of the regulations issued by the Secretary of the Treasury * * *, published in special circular numbered sixteen," and is therefore, by force of the act of July 29, 1882, to be refunded. The fact that it was collected June 6, 1865, before the circular was issued, June 21, 1865, does not alter this result. (See letter of Secretary of June 19, 1873, recommending such refunding, foot-note, *ante*.) The sum of \$1,145, paid for special 5 per cent. war tax on income within the terms of the circular became "due [October 1, 1864] after the establishment of" the assessment division (August 30, 1864), and so was not "collected * * * contrary to the provisions of the regulations * * *, circular numbered sixteen."

from your office, and am of opinion that, under the existing laws, the taxes paid by these parties were legally paid and should not be refunded. But I fully recognize the hardship of the case, and desire that such claimants may receive relief from Congress.

I have therefore to suggest that you will in your next annual report, or on any other occasion which you may deem more fitting, recommend the passage of a special act authorizing the refunding of all taxes paid by residents of the insurrectionary States, which under Department Circular of June 21, 1865, should not have been collected, such refunding to be made whether the tax in question was collected before or after the issue of the circular.

I am very respectfully,

WILLIAM A. RICHARDSON,
Secretary.

Hon. J. W. DOUGLASS,
Commissioner Internal Revenue.

- If the act of July 29, 1882, is mandatory in requiring payment to the persons, and in the amounts therein named, this sum must be repaid. If the purpose of Congress was to name the persons to whom repayments should be made, limit the maximum amount to be repaid, and repay only such sums as had been "collected * * * contrary to the provisions of the * * * circular," thus requiring an inquiry and the exercise of judgment by the accounting officers, then this sum cannot be repaid. A statute which merely "authorized" the payment of a sum of money by the head of a department is not mandatory either in fact or in amount. (8 Op. Att. Gen., 39; see *French v. Edwards*, 13 Wall., 511.) When the terms of a statute leave room for any administrative discretion to be exercised, it is not mandatory. (*United States v. Guthrie*, 17 How., 284.) The intention of the law-making power is the controlling element in the interpretation or construction of a statute. (*Wilkinson v. Leland*, 2 Pet., 627, 662; *United States v. Saunders*, 22 Wall., 492.) The intention of Congress is declared in the act of July 29, 1882, to be, to authorize and direct the Secretary of the Treasury to refund to certain citizens of Tennessee therein named "the amount of taxes * * * collected from the said named persons contrary to the provisions of the circular numbered sixteen"; and the act then specifies the names of the persons and the amounts collected contrary to the provisions of the circular. If the act had simply provided for the repayment of "the amount of taxes * * * collected from * * * persons contrary to the * * * circular," it would have been necessary to ascertain the claim of all persons, without limitation as to name, amount, or residence. A rule of construction requires that some effect shall, if practicable, be given to every provision of a statute. (Sedgwick, *Construction Stat. and Const. L.*, 2d ed., 200 n.) This rule may be complied with by giving to the clauses of the statute which give the names and residences of persons, and the amounts specified, the effect of limiting the authority to make repayments to the persons named and identified by residence, and of amounts of taxes collected contrary to the circular, not exceeding the amounts specified. It may reasonably be inferred that this was the effect intended, because, if the full amount specified must as to each person named be repaid to him, the purpose of Congress as stated is defeated, as in this case, by the repayment of a sum of money not collected contrary to the circular. The statute gives two modes of ascertaining the intention of Congress as to the amount to be repaid, first, by describing it as "the amount of taxes * * * collected from * * * named persons contrary to the * * *, circular;" and, second, by describing the persons and amounts. The reason of the passage of the act was the unauthorized collection contrary to the circular. Its purpose is to repair a wrong done—not to do a wrong to the government by repaying money which had been rightfully collected under the circular.

It is impossible to refund in accordance with the two modes prescribed

in the act for fixing the amount, because they are in conflict. In such case of conflict the reason which operated in passing the act, and the justice on which it is founded, should by every fair principle control a mere error of Congress in specifying the amount.* The effect of a statute is an element in construing it. (*Henderson et al. v. Mayor of New York*, 92 U. S., 259.) This result conforms to the rule, that when there are two descriptions given to identify an object, one correct, one erroneous, the former shall be adopted, the latter rejected. (*False Description Case, ante*; 1 Greenl., Ev., § 301.) And it gives effect and assigns a just purpose to those words of the statute which require a refund only of the amount of taxes collected contrary to the circular. It is just as important to give effect to these words as to those which state the amounts. If the stated amounts control, then no effect is given to the words which require a refunding only of amounts collected contrary to the circular, whereas a reasonable effect is found for both classes of words by giving the effect stated to each. This construction reconciles apparently conflicting clauses, and this should be done if possible. (*Beals v. Hale*, 4 How., 37.) This restrains the operation of the words stating the amounts by the prior words, which declare the purpose only to refund sums collected contrary to the provisions of the regulations issued by the Secretary of the Treasury and published in circular numbered sixteen. There is a rule of construction which requires that words in a statute are to be restrained within narrower limits than their ordinary import, when their literal meaning would extend to persons or amounts which the legislature did not intend them to include. (*Lessee of Brewer v. Blougher*, 14 Pet., 178.)

There is a general rule in the construction of statutes, that "a thing given in particular shall not be taken away by general words." (*Proceeds of Sales Case, ante*, 52; Greenl., Ev., § 301; *Dwarris, Stats.*, 2d ed., 513, 668; *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 360.) It may be said, that upon this rule the several sums mentioned in the act of July 29, 1882, are given in particular, and should not be taken away in any part by the general words in the first clause of the statute. The general rule is as stated, but it always yields when necessary to carry out the intention of Congress. The intention of Congress, as

* Lord Coke says, in Inst. 1, 19 b, in regard to an averment in the preamble of a statute that "the rehearsal or preamble of a statute is to be taken for truth, for it cannot be thought that a statute that is made by authority of the whole realm * * * will recite a thing against the truth." Hardcastle, in his work on Statutory Law (London 1879), 241, says, that "this proposition is too wide an one to be accepted as correct at the present day"; citing *Leicester v. Haydon*, Plowd., 398; *Stead v. Carey*, 14 L. J. C. P., 182; *R. v. Sutton*, 4 M. & S., 532; *Earl of Carnarvon v. Villebois*, 13 M. & W., 313; *R. v. Haughton*, 22 L. J. M. C., 89; *Wharton Peerage Case*, 12 Cl. & F., 292; *Edinbro' and Glasgow Railway v. Linlithgow*, 3 Macq., 704; *Shrewsbury Peerage Case*, 7 H. L. Cases, 13. See *Sedgwick, Construction Stat. and Const. L.*, 2d ed., 44, citing *Duncombe v. Prindle*, 12 Iowa, 1; *Parmelee v. Thompson*, 7 Hill, 77; *Elmandorff v. Carmichael*, 3 Litt., 473.

ascertained from all the sources recognized as proper for consideration, is the controlling element in construing an act of Congress. All other rules yield to this—it prevails even against the language of an act. (Sedgwick, *Construction Stat. and Const. L.*, 2d ed., 196.)

There is another view to which it may be proper to allude. Congress could provide for the payment of sums specified in an act to persons named therein for any purpose authorized by the Constitution, without describing any original claim on which to base payments. The act of July 29, 1882, does two things competent to be done: first, it directs in general terms the repayment of “the amount of taxes * * * collected from * * * persons contrary to * * * circular numbered sixteen,” and, second, it limits payments to “named” persons, and, perhaps, limits the amounts payable to each. If a construction should be given to the act which would make absolute, imperative and mandatory the payment of the full amount specified for each person named as and for “the amount of taxes * * * collected * * * contrary to the * * * circular,” this would amount to a decision of a question of law and a question of fact—the unlawful collection a question of law, the amount a question of fact—arising under the provision for repayment of “amount of taxes * * * collected * * * contrary to the * * * circular.” It might seem to make Congress decide what the law was—that money had been collected contrary to the circular. “A legislature cannot declare what the law was, but what it shall be.” (*Ogden v. Blackledge*, 2 Cranch, 272; *Cooley, Const. Lim.*, 4th ed., [92], [347], 430 *n.*) “That is not legislation which adjudicates in a particular case, prescribes the rule contrary to the general law, and orders it to be enforced.” (*Ervine's Appeal*, 16 Penn. St., 266; *Cooley, Const. Lim.*, [91].) “To compare the claims of parties with the law of the land before established is in its nature a judicial act.” (*Id.* [92].)

If Congress should, in addition to this, decide a question of fact, and award relief by statute, the question presented would be still more difficult. Congress has always exercised the unquestioned power to examine claims by a proper committee, and provide for their payment. But when, as in this case, a statute directs the payment by the Secretary of the Treasury of claims by a rule prescribed therein, it would be so unusual for Congress to adjust the claims under such rule, that it may fairly be supposed that the enumeration of claimants and the specification of amounts was not intended as a mandatory provision. This does not imply a doubt of the power of Congress, but is only an application of reasons for a particular construction.

The result is, that the claimant is entitled to repayment of \$1,145 for annual income tax collected contrary to the circular numbered sixteen, and is not entitled to the repayment of the amount of the special 5 per cent. war tax of \$1,145. The principle thus decided applies to a large number of claims.

The effect of any action already taken on these claims has not been

examined. If a re-examination be required for that purpose, it can be considered.*

The allowance is to pay "in accordance with said act." Payment will be made on the principles stated, and the amounts to which the claimants are not entitled will be suspended.

TREASURY DEPARTMENT,

First Comptroller's Office, October 21, 1882.

IN THE MATTER OF CONFLICTING DESCRIPTIONS IN AN APPROPRIATION ACT OF THE AMOUNT OF SALARY DUE A PUBLIC EMPLOYÉ—COLBATH'S CASE.

1. The rule applied, that the intention of the law-making power is the controlling element in construing statutes.
2. When an appropriation act contains duplicate but conflicting descriptions of the sum to be paid a claimant, one true, and the other erroneous; when considered in connection with extrinsic facts, the true is to be adopted, and the erroneous rejected.
3. General language or words in a statute may be controlled and limited by its evident purpose.
4. S. H. Colbath acted as a messenger of the Senate from April 1, 1877, to May 5, 1879. The salary of a messenger, fixed by act of June 19, 1878 (20 Stat., 178), was at the rate of \$1,440 per year. Under act of April 30, 1878 (20 Stat., 41), payment was made to S. H. Colbath of \$118.70, for salary of April, 1877. The act of August 5, 1882 (22 Stat., 257, 270), appropriated \$1,258.89, "to enable the Secretary of the Senate to pay S. H. Colbath * * * the balance of salary due by law to one discharging the duties performed by him as a messenger of the Senate from April first, eighteen hundred and seventy-seven, to May fifth, eighteen hundred and seventy-nine." The salary "due by law" is not \$1,258.89, but only \$1,140.19. *Held:* That only \$1,140.19 could lawfully be paid.

The deficiency appropriation act of April 30, 1878 (20 Stat., 41), makes the following appropriation:

"To pay S. H. Colbath the salary of a messenger of the Senate for the month of April, eighteen hundred and seventy-seven, at the rate of one thousand four hundred and forty dollars per annum, one hundred and eighteen dollars and seventy cents."

May 11, 1878, this sum of \$118.70 was paid said Colbath by the Secretary of the Senate as disbursing officer. The deficiency appropriation

* On the schedule of claims referred to in the foregoing opinion, and under the order of the acting Secretary thereon indorsed, the Secretary of the Treasury made the following order:

TREASURY DEPARTMENT,
December 7, 1882.

The foregoing order of September 11, 1882, is construed to mean only that such sums shall be refunded or paid as were collected from the persons within named contrary to the provisions of the regulations issued by the Secretary of the Treasury under date of June 21, 1865, mentioned in said act, and effect is to be given to said order accordingly.

CHARLES J. FOLGER,
Secretary.

act of August 5, 1882 (22 Stat., 257, 270), makes the following appropriation:

“That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter stated, namely:

* * * * *

“To enable the Secretary of the Senate to pay S. H. Colbath the sum of one thousand two hundred and fifty-eight dollars and eighty-nine cents, the balance of salary due by law to one discharging the duties performed by him as a messenger of the Senate from April first, eighteen hundred and seventy-seven, to May fifth, eighteen hundred and seventy-nine.”

August 12, 1882, the Acting Secretary of the Senate paid said Colbath said sum of \$1,258.89. The account of the Acting Secretary, including a voucher for this payment, was presented to the First Auditor for settlement, and is now before the First Comptroller for final action.

Salaries of Senate messengers were provided for by appropriation acts as follow: Act of January 26, 1877 (19 Stat., 226), for fiscal year 1877, at \$1,200 each per annum; act of June 19, 1878 (20 Stat., 178) for fiscal year 1879, at \$1,440 each per annum.

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Opinion by WILLIAM LAWRENCE, *First Comptroller*:

The payment made by the Acting Secretary of the Senate, August 12, 1882, covers the services of Mr. Colbath as for “one discharging the duties performed by him as a messenger of the Senate from April first, eighteen hundred and seventy-seven, to May fifth, eighteen hundred and seventy-nine,” when, in fact, he had been previously paid “the salary of a messenger of the Senate for the month of April, eighteen hundred and seventy-seven,” the sum of \$118.70.

If the clause in the act of August 5, 1882, which makes the appropriation of \$1,258.89, is mandatory, requiring payment of the whole amount to Mr. Colbath, the Acting Secretary, as disbursing officer, is entitled to credit therefor in the settlement of his account. If, however, Congress intended only to pay, as the act of August 5, 1882, declares, “the balance of salary due by law,” to Mr. Colbath, for services “as a messenger of the Senate from April first, eighteen hundred and seventy-seven, to May fifth, eighteen hundred and seventy-nine,” then there must be disallowed \$118.70, which had been previously paid for the services of the month of April, 1877, and which was not thereafter “due by law.” The intention of Congress is the controlling element in the construction of statutes. (Bishop, *Written Laws*, 70, 75, 76, 82, 93, 200, 231, 235, 237; *Wilkinson v. Leland*, 2 Pet., 662.) The act of August 5, 1882, shows that the intention of Congress was to pay, as it says, “the balance of salary due by law” to Mr. Colbath, as one having performed the duties of a messenger of the Senate from April 1, 1877, to May 5, 1879. The use of the word “balance” implies that a portion of the salary had been previously paid. If the act had fixed no amount, but had stopped with the provision quoted, there would have been a sufficient description of

the amount to enable the proper accounting officers to fix the sum to be paid. Nothing further was necessary. But the act of August 5, 1882, specified a sum as due, \$1,258.89, which was larger in amount than "the balance of salary due by law," by the sum of \$118.70 previously paid. It is not possible to make payment according to these two conflicting directions or provisions for ascertaining the amount. In such case, the erroneous amount is to be rejected, and payment is to be made of the balance due by law. Thus, it is said of statutes, in a new and valuable work, that "if the true reading is evident, and the meaning is, notwithstanding the errors, certain, the statute stands, and is to be interpreted as though they were corrected." (Bishop, Written Laws, 79, 212, 243.) In this case, either the amount specified in the act of August 5, 1882, must control the expression, "the balance of salary due by law," or the latter must control the former, for both cannot be operative. It is manifest that Congress intended to pay the balance due, whatever it might be, and no more. This view is supported by maxims: *qui hæret in literâ, hæret in cortice—falsa demonstratio non nocet, cum de corpore constat. Verba generalia restringuntur ad habilitatem rei vel personam.* General language is always limited by the object of an act. (Sedgwick, Construction Stat. and Const. Law, 2d ed., 361, *n*; *Wheeler v. McCormick*, 8 Blatch. C. C., 267; *State ex rel. Missouri Mutual Life Ins. Co. v. King*, 44 Missouri, 283.)

The sum of \$118.70 will be disallowed in this account.

TREASURY DEPARTMENT,

First Comptroller's Office, October 31, 1882.

NOTE BY FIRST COMPTROLLER.

Hardeastle, in his work on Statutory Law, 245, says that "a court of law is not authorized to supply a *casus omissus*, or to alter the language of a statute for the purpose of supplying a meaning, if the language used in the statute is incapable of one." *Green v. Ward*, 7 Q. B., 178; *Everett v. Wells*, 2 M. & G. 277; *Chancellor of Oxford v. Bishop of Coventry*, 10 Rep. 576; *Regina v. Wilcock*, 7 Q. B., 338, and he then proceeds to say:

"It appears also that an evidently accidental omission in the schedule to an Act may be supplied. Thus in *R. v. Strachan*, L. R. 7 Q. B., 465, it appeared that by 33 & 34 Vict., c. 97, sch. *sub tit.* Voting-Paper, 'any instrument for the purpose of voting by any person entitled to vote at any meeting' was to be stamped with a 1d. stamp. It was argued that the expression 'at any meeting' included the assembling of the town council to elect aldermen, and that consequently all voting-papers used at such elections must be stamped. But the court held otherwise, on the ground that it could never have been the intention of the legislature by such an enactment as this to alter the whole system of voting at public elections. 'We must take it,' said Cockburn, C. J., 'that this schedule having been alphabetically arranged, instead of as in the former Act, there has been an *accidental omission* of some words of reference, such as the word 'such.'"

"It is worthy of observation that in the United States a different principle appears to obtain with regard to clerical errors in statutes. In 1872 an act of Congress was passed which contained a clause exempting from the 20 per cent. *ad valorem* duty 'fruit-plants, tropical and semi-tropical,' but in the engrossed act of Congress a comma was substituted by a clerical error for the hyphen, and consequently the exempt-words stood thus, 'fruit, plants, tropical and semi-tropical.' In consequence of this mistake certain Bahama traders brought actions in the United States courts to recover the 20 per cent. *ad valorem* duty that they had been compelled to pay upon tropical fruit subsequent to the 6th of June, 1872. The United States Government allowed the actions to go by default, as the Secretary of the Treasury decided that the clerical error rendered a new Act of Congress necessary to enforce any duty upon

tropical fruit, and the United States Government repaid to the Bahama traders some 50,000 dollars in consequence of this mistake."

In a note as to this statement in relation the act of 1872, it is said by Hardcastle:

"The authority for this statement is the Blue Book of the Bahamas for the year 1873, transmitted to the Colonial Office by Governor Pope Hennessy, May 27, 1874, and published in a parliamentary blue book entitled 'Papers Relating to H. M.'s Colonial Possessions, Part I, 1875.'"

The case on which the Secretary of the Treasury made the decision was Manuscript Case No. 1466, Book of Miscellaneous Customs Cases, for which see also Synopsis of Treasury Department Decisions, 1873, No. 1730; Solicitor's Opinion, December 2, 1873. The Attorney-General held in Thompson's case March 24, 1857, that "the acts of Congress * * * enrolled in the Department of State are conclusive evidence of the written law." 9 Opinions, 1. He also held that "neither the journals of Congress, nor any other species of extrinsic evidence can avail to strike anything out of the acts passed, or interpolate anything into them." 9 Opinions, 1. 9 Opinions, 270. But see *Blake v. National Bank*, 23 Wallace, 307.

It may not be certain that the "Fruit-plant" case adopts a rule different from that which prevails in England. It may have been decided not on the question of punctuation, but, perhaps, on the rule that in cases of serious ambiguity or doubtful construction in revenue acts, that doubts are to be resolved in favor of the importer. *Sedgwick Stat.*, 288 n. *Powers v. Barney*, 5 Blatchford, C. C. R., 202. The case might well have been decided on this principle, for it is well settled that "common sense should prevail over strict grammatical rules, and punctuation should not control." *Sedgwick Stat.*, 225 n.

IN THE MATTER OF THE APPOINTMENT BY THE PRESIDENT OF AN OFFICER "TO PERFORM THE DUTIES OF THE OFFICE OF THE FIRST COMPTROLLER IN" THE TREASURY DEPARTMENT "DURING THE ABSENCE * * * OF THE SAID FIRST COMPTROLLER AND THE DEPUTY FIRST COMPTROLLER IN THE SAID DEPARTMENT."—COMPTROLLER'S CASE.

1. In case of the "absence, or sickness," of both the First Comptroller and the Deputy First Comptroller of the Treasury Department, the President has power to "authorize and direct * * * any other officer" in the Department, "whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties" of First Comptroller, until "such absence or sickness shall cease."
2. It is competent for the President to make a general order applicable to such cases of absence or sickness.
3. The President's order of October 23, 1882, authorizing and directing the Second Comptroller to act in such cases, is valid.

The Revised Statutes contain the following sections:

"SEC. 177. In case of the death, resignation, absence, or sickness of the head of any Department, the first or sole assistant thereof shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such head until a successor is appointed, or such absence or sickness shall cease.

"SEC. 178. In case of the death, resignation, absence, or sickness of the chief of any Bureau, or of any officer thereof, whose appointment is not vested in the head of the Department, the assistant or deputy of such chief or of such officer, or if there be none, then the chief clerk of such Bureau, shall, unless otherwise directed by the President, as provided by section one hundred and seventy-nine, perform the duties of such chief or of such officer until a successor is appointed or such absence or sickness shall cease.

"SEC. 179. In any of the cases mentioned in the two preceding sections, except the death, resignation, absence, or sickness of the Attorney-General, the President may, in his discretion, authorize and direct the head of any other Department or any other officer in either Department whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the vacant office until a successor is appointed, or the sickness or absence of the incumbent shall cease.

"SEC. 180. A vacancy occasioned by death or resignation must not be temporarily filled under the three preceding sections for a longer period than ten days.

"SEC. 181. No temporary appointment, designation, or assignment of one officer to perform the duties of another, in the cases covered by sections one hundred and seventy-seven and one hundred and seventy-eight, shall be made otherwise than as provided by those sections, except to fill a vacancy happening during a recess of the Senate.

"SEC. 182. An officer performing the duties of another office, during a vacancy, as authorized by sections one hundred and seventy-seven, one hundred and seventy-eight, and one hundred and seventy-nine, is not by reason thereof entitled to any other compensation than that attached to his proper office."

Under these provisions of the Revised Statutes the President made an order as follows:

UNITED STATES OF AMERICA,
Washington City, District of Columbia :

EXECUTIVE MANSION, *October 23, 1882.*

I, Chester A. Arthur, President of the United States, do hereby authorize and direct the Second Comptroller in the Department of the Treasury of the United States to perform the duties of the office of the First Comptroller in said Department now and at all times hereafter during the absence from said Department of the said First Comptroller and the Deputy First Comptroller in said Department.

CHESTER A. ARTHUR.

One copy of this order is filed in the office of the First Comptroller, and one in the office of the Second Comptroller, in the Department of the Treasury.

The propriety of such order was suggested by the fact that, on one occasion during the necessary absence of the First Comptroller, the Deputy First Comptroller was detained from his office by severe illness. The order is fully authorized by the statutes.

On the occasion stated the First Comptroller and the Deputy were both absent. The appointment of the First and Second Comptrollers in the Treasury Department "is not vested in the head of the Department." (Rev. Stats., 268.) The First Comptroller is chief of a bureau, and the Deputy is an officer thereof. The First Comptroller is an officer whose "absence" is mentioned in section 178 of the Revised Statutes.

By the explicit language of section 179 of the Revised Statutes the President may "authorize and direct * * * any other officer in either Department, whose appointment is vested in the President, * * *, to perform the duties * * * until * * *, the sickness or absence of the incumbent shall cease." It is competent for the President to make a general order applicable to such cases of absence or sickness. He is not required to make an order for each particular case as it arises. (*Williams v. The United States*, 1 How., 290.)

The purpose of the statute is to authorize the President to provide by a special order in each case of necessity as it may arise, or by a general order which will meet any case or cases as occasion may require.

The order of the President will be filed in this office, in the "Division of Bonds, Contracts, and Powers of Attorney" in the files of communications and orders of the President.*

FIRST COMPTROLLER'S OFFICE,

Treasury Department, November 10, 1882.

* The legislative, executive, and judicial appropriation act of March 3, 1883, provides:

"That the Deputy First Comptroller in the Department of the Treasury shall be, and is authorized, in the name of the First Comptroller, to countersign all warrants, except accountable warrants, and to sign all other papers in like manner under the direction of the First Comptroller; and in case of the death, resignation, absence, or sickness of the Deputy First Comptroller, the Secretary of the Treasury may, by an appointment under his hand and official seal, delegate to any officer in the office of the First Comptroller the authority to perform the duties of the Deputy First Comptroller until a successor is appointed or such absence or sickness shall cease."

Under this provision an order was made by the Secretary of the Treasury March 9 1883, as follows:

UNITED STATES OF AMERICA,

TREASURY DEPARTMENT,
Washington City, D. C., March 9, 1883.

It is made to appear to the Secretary of the Treasury, and he so adjudges, that Hon. Jonathan Tarbell, the Deputy First Comptroller in the Department of the Treasury, has been, is, and continues to be, absent from the Department of the Treasury, of the United States by reason of sickness. Now, therefore, in pursuance of the statute in such case made and provided, the Secretary of the Treasury hereby appoints Joseph Addison Thomson, who is an officer in the office of the First Comptroller in said Department, and delegates to said Thomson so appointed the authority to perform the duties of the said Deputy First Comptroller until said sickness and absence of said Deputy First Comptroller shall cease.

In testimony whereof the said Secretary of the Treasury hereto subscribes his name, and affixes the official seal of said Department this ninth day of March, A. D. 1883.

[OFFICIAL SEAL OF DEPARTMENT.]

CHAS. J. FOLGER,
Secretary, &c.

This was rendered necessary by the sickness and consequent absence of the Deputy First Comptroller since October 5, 1882.

IN THE MATTER OF THE PAYMENT OF LOST REGISTERED BONDS OF THE UNITED STATES, WITH INDORSEMENTS IN BLANK MADE THEREON BY THE PAYEE, BUT WITH NO CERTIFICATES OF THE ACKNOWLEDGMENT OF THE EXECUTION THEREOF.—GIBSON'S CASE.

1. *Quære?* Whether, if an imperfect assignment is made by the payee in a registered bond of the United States, to a purchaser for sufficient value paid, a court of equity may enjoin the payee from receiving payment of the bond and decree a specific performance of the assignment.
2. The United States may, in a proper case, file a bill of interpleader to determine the rights of adverse parties claiming a right to payment of a registered government bond.
3. The assignee of a chose in action is subject to all the equities between the assignor and the debtor, but the holder of a negotiable instrument indorsed for value in the usual course of business before maturity takes it relieved of such equities, and is entitled to payment as against all the world.
4. Registered bonds of the United States are assignable but not negotiable. They have some, but not all, the attributes of negotiability.
5. The Secretary of the Treasury has authority to prescribe regulations relative to the transfer on the books of the Treasury Department of registered bonds, and to require assignments to be acknowledged before such officers as he may designate as a condition precedent to a right of transfer.
6. The payee in a registered bond, who executes and acknowledges an assignment in blank thereof duly certified, and permits it to pass before maturity to a *bond fide* purchaser for value in the usual course of business, will generally be estopped from denying the right of such purchaser to a transfer or payment of such bond, especially if such purchaser is without notice in law or fact that the bond was put in circulation with an assignment in blank.
7. The legal title to a registered bond of the United States only passes by a transfer on the books of the Treasury Department, but the right to a transfer is perfect when an assignment in due form is properly filed in the Department.
8. A *bond fide* purchaser of bonds issued to him by duly authorized officers is generally entitled to be protected (1) against irregularities preceding the issue, and, as it has been held, (2) in case a new bond is issued in lieu of one assigned to him and surrendered for reissue, and (3) in some cases of successive transfers of bonds assigned in blank with a duly certified acknowledgment of execution of assignment.
9. When the payee in a registered bond of the United States in good faith makes an indorsement in blank, and it is lost without any certificate of the acknowledgment of the execution of the assignment thereon, and passes into the hands of a *bond fide* purchaser for value before maturity, and in the usual course of business, the payee is not estopped from asserting his rights in such bond.

December 28, 1881, Wm. J. Gibson, owning United States registered bonds numbered 50879 and 50880, for \$1,000 each, issued under acts of July 17 and August 5, 1861 (12 Stat., 259, 313), and "continued" at 3½ per cent., signed his name to the printed indorsements in blank on the back of the bonds in the presence of George Leslie, cashier of the National Bank of Newberry, at Wells River, Vt.; and they were to be by him sold for Gibson. They were then delivered over the counter of

the bank to the teller of the bank to enter for sale on the books of the bank. The bank teller took them and laid them on his desk, since which time it is alleged that they have not been seen by Gibson nor by any person connected with the bank, and it is supposed that they were probably burned with the waste paper of the bank. The cashier did not attach his certificate to the printed blank under the signature of Gibson. (See form of blank indorsement in *note* to Barnett's Case, *ante*, 203.) The bonds are included in the "108th Call" of the Secretary, stating that they "will be paid at the Treasury of the United States * * * on the 8th of April, 1882, and that interest on said bonds will cease on that day." They were "under due" to that time. (See 9 Op. Att. Gen., 413.) Application is now made by Gibson to the United States for payment under the call as upon lost or destroyed registered bonds. (1 Lawrence, Compt. Dec., App., ch. 13, 574.)

The act of July 17, 1861 (12 Stat., 259, sec. 2), under which the bonds were issued, provides that—

"The registered bonds shall be transferable on the books of the Treasury on the delivery of the certificate, and the coupon bonds and treasury notes shall be transferable by delivery."

The act of June 22, 1860 (12 Stat., 79, sec. 2), authorized the issue of registered bonds, or, as they are therein denominated, "certificates of stock * * * for the amount so borrowed, in favor of the parties lending the same, or their assigns, which certificates may be transferred on the books of the Treasury, under such regulations as may be established by the Secretary of the Treasury."

The act of December 17, 1860 (12 Stat., 121), authorized the issue of Treasury notes different in character from other public securities, and provided "That said treasury notes shall be transferable by assignment indorsed thereon by the person to whose order the same may be made payable, accompanied together with the delivery of the note so assigned."* Many of these notes were issued in blank as to payee, others with the name of the payee therein written, and assignments of them were not registered by the Register of the Treasury Department. The act of February 8, 1861 (12 Stat., 129, sec. 2), and the act March 2, 1861 (12 Stat., 178, sec. 2), each contain a provision similar to that in the act of June 22, 1860 (12 Stat., 79, sec. 2), above quoted. The subsequent loan acts authorize loans, and the issue, as evidence of indebtedness, of "coupon or registered bonds of the United States," without any specific provision as to assignment or transfer on the books of the Treasury Department. The registered bonds under all the loan acts have been, by their terms, payable to the payee named "or assigns."

The Secretary of the Treasury has always provided by "regulations"

*As to rights of *bond fide* purchasers of Treasury notes assigned after maturity, see 9 Op. Att. Gen., 413; *National Bank of Washington v. Texas*, 20 Wall., 72, distinguishing *Texas v. White and Chiles*, 7 Wall., 718, *Texas v. Hardenberg*, 10 Wall., 68, and following *Texas v. Huntington*, 16 Wall., 402; *Hotchkiss v. National Banks*, 21 Wall., 354; *Baldwin v. Ely*, 9 Howe, 580, 600.

for the transfer of all registered bonds on the books of the Department. (1 Lawrence, Compt. Dec., App., ch. 13, 2d ed., 560.) The regulations are a necessity, and made in pursuance of the general power of the Secretary when not specifically authorized. These require the assignment to be acknowledged by the assignor before certain designated officers.*

OPINION BY WILLIAM LAWRENCE, *First Comptroller*.

The indorsements as originally made on the bonds now under consideration are incomplete. If a controversy existed between Gibson, the payee in the bonds, and a *bonâ fide* purchaser from him for valuable consideration before maturity, to whom they might have been delivered with the blank assignments duly filled in but without formal certificates of acknowledgment, there is much authority for saying that the proper court of equity would enjoin Gibson from receiving payment of the bonds, and decree a specific performance of the contracts of assignment, which the Treasury Department would respect.† The United States might in such case file a bill of interpleader requiring a decree to determine the rights of the parties. (*Vermilye & Co. v. Adams Express Co.*, 21 Wall.,

*The existing regulations, substantially similar to those previously in force, declare that—

“The registered bonds of the United States differ from the coupon bonds in the following respects, namely: (1) They have inscribed or expressed upon their face the names of the parties who own them, denominated *payees*; (2) they are payable only to such payees or their assigns; and (3) the property or ownership in them can be transferred only by assignment. For the purpose of assigning them, *there are forms printed on the backs of the bonds*, together with directions to be followed in the execution of such assignments.

“A ledger account is opened in the Department with each holder of one or more registered bonds; and in this account each bond is fully described. All recognized transfers *must be made upon the loan-books in the Register's office*.” (1 Lawrence, Compt. Dec., App., ch. 13, 2d ed., 563.)

In a note to the “forms printed on the backs of the bonds” it is declared, that “the execution and acknowledgment of the above assignment, when not made at the Treasury Department, must be before a U. S. judge, U. S. district attorney,” or other officer specified. (*Barnett's Case*, *ante*, 203.) As to effect of estoppel on informal assignments and the statute of frauds, see *Stowe v. United States*, 19 Wall., 16; *Swain v. Seamens*, 9 Wall., 272; *Herman*, Estoppel, sec. 330.

†*Combs v. Hodge*, 21 How., 397. As to specific performance of contracts for the sale of shares in corporations, see 16 *American Law Review*, Boston, August, 1882, 606, citing *Cuddee v. Rutter*, 5 Vin. Abr., 538; *Doloret v. Rothschild*, 1 Sim. & Stuart, 590; *Clark v. Flint*, 22 Pick., 231; *Duncuft v. Albrecht*, 12 Sim., 190; *Cheale v. Kenward*, 3 De G. & J., 27; *Parish v. Parish*, 32 Beavan, 207; *Cowles v. Whitman*, 10 Conn., 121; *Eastman v. Plumer*, 46 N. H., 464; *Ross v. Union Pacific Railway Co.*, 1 Woolw. C. C., 26; *Strasburg R. R. Co. v. Echternacht*, 21 Penn., 220; *Foll's Appeal*, 91 Penn., 434; *Baldwin v. Commonwealth, &c.*, 11 Bush, Ky., 417; *Leach & wife v. Fobes*, 11 Gray, 506; *Todd v. Taft*, 7 Allen, 371; *Jones v. Robbins*, 29 Maine, 351. See also *Burroughs*, Public Securities, 139, 252; *Angell & Ames, Corp.*, 564, 566, 576; *Sallu's case*, 1 Lawrence, Compt. Dec., 214. As to injunction, *Texas v. Hardenberg*, 10 Wall., 68; *Walker v. Smith*, 21 How., 579; *Board of Liquidation v. McComb*, 92 U. S., 531; *Gaines v. Thompson*, 7 Wall., 347. As to invalidity of judicial sale of registered bonds, *Combs v. Hodge*, 21 How., 407; *Menard v. Shaw*, 5 Texas, 334.

138.) But the case now under consideration presents a different question. Gibson is entitled to payment of the lost bonds, unless (1) they passed before maturity to a *bonâ fide* purchaser for value, and (2) such purchaser thereby acquired a right to payment of the bonds relieved of all equities of the payee therein, or unless (3) Gibson is estopped from asserting such equitable right as he had to the bonds. These propositions will be considered in their order.

I. In view of the facts, and for the protection of the United States, it may be assumed, that some finder of the bonds, or thief who stole them, did before maturity sell them to a *bonâ fide* purchaser. This presumption at least should prevail until rebutted by evidence, either in fact, or that arising from such lapse of time as would induce a conclusion of a different result.

II. The second proposition raises this question: Is the *bonâ fide* purchaser for value before maturity of a registered bond of the United States, assigned to him in due form except that there is no certificate of the acknowledgment thereof before an officer, chargeable with notice of the rights of prior parties thereto?

1. If the bonds are choses in action, any *bonâ fide* purchaser takes them charged in law with notice of all the equities or rights which attach to them, provided the assignor has done nothing to estop him from asserting his rights. Thus it has been said:

"To constitute an assignment of a debt or other chose in action, in equity, no particular form is necessary. * * * The reason is, that the fund being a matter not assignable at law, nor capable of manual possession, an appropriation of it is all that the nature of the case admits of, and therefore it is held good in a court of equity. As the assignee is generally entitled to all the remedies of the assignor, so he is subject to all the equities between the assignor and his debtor." (*Spain v. Hamilton's Admr.*, 1 Wall., 624; *Scott v. Shreeve*, 12 Wheat., 608; *Shirras & others v. Caig & Mitchel*, 7 Cranch, 48; *Kinsman v. Parkhurst*, 18 How., 289.)

So it has been said of the assignment of certificates declaring "the bearer" to be entitled to certain specified sums in a certain description of bonds, that:

"Written contracts are not necessarily negotiable simply because by their terms they enure to the benefit of the bearer. Doubtless the certificates were assignable, and they would have been so if the word bearer had been omitted, but they were not negotiable instruments * * * Holders might transfer them, but the assignees took them subject to every equity in the hands of the original owner." (*Railroad Co. v. Howard*, 7 Wall., 415; *Mechanic's Bank v. N. Y. & N. H. Rail-*

[Continuation of foot-note from page 288.]

See, also, 2 Kent, Com., Lecture 38, p. 443, 11 ed.; *Bayard v. Huffman*, 4 Johns., Ch. R., 450.

As to power of courts to decree assignments of bonds and enforce it *in personam*, see *Pennoyer v. Neff*, 95 U. S., 723; *Penn v. Lord Baltimore*, 1 Ves., 444; *Massie v. Watts*, 6 Cranch, 148; *Watkins v. Holman*, 16 Peters, 25; *Corbett v. Nutt*, 10 Wall, 464; *Klink's Case*, 1 Lawrence, Compt. Dec., 2d ed., 247; *Burroughs, Public Securities*, 33.

road Co., 13 New York, 599; Jones, Railroad Securities, 201, 202. See Law Reports, 10 Exchequer Cases, 339.)

2. If, however, (1) the bonds are negotiable instruments, and (2) have been lawfully assigned to a *bonâ fide* purchaser for value before maturity in the usual course of business, the person thus acquiring them will be entitled to payment against all the world. This is so well settled that it is no longer a matter of dispute. (Daniel, Neg. Insts., § 1; 1 Cranch, App., note a, 367; 1 Parsons, Cont., 6th ed., 238; Burroughs, Public Securities, 138; Goodwin v. Roberts, Law Reports, 10 Exchequer Cases, 337; Galveston Railroad v. Cowdrey, 11 Wall., 459; Moran v. Comrs. of Miami Co., 2 Black, 722; Mercer County v. Hackett, 1 Wall., 83; Combs v. Hodge, 21 How., 405; Comrs. of Marion County v. Clark, 94 U.S., 278; Bridgeport Bank v. New York, &c., R. R. Co., 30 Conn., 254; Delafield v. State of Illinois, 2 Hill, N. Y., 177; Bank of Rome v. Village of Rome, 19 New York, 20.) The onus is on the purchaser of a stolen bill to show his purchase in good faith. (Combs v. Hodge, 21 How., 405; 2 Daniel, Neg. Insts., § 1470; 1 Daniel, Neg. Insts., § 815, n, and cases collected.)

3. The bonds are assignable, but not negotiable. They have some, but not all the attributes of negotiability. This results from—(1) the statute under which they were issued, (2) the authorized regulations in relation to transfers, (3) the approved definitions of negotiability, (4) the authority of elementary writers, and (5) adjudicated cases.

(1). The act of July 17, 1861 (12 Stat., 259), affixes this character to registered bonds. This act authorizes the issue of three classes of public securities, treasury notes, coupon bonds (both payable to bearer), and registered bonds. It declares that—

“The registered bonds shall be transferable on the books of the Treasury on the delivery of the certificate, and the coupon bonds and treasury notes shall be transferable by delivery.”

The evident purpose of Congress was to secure an opportunity for investment in two classes of securities negotiable by delivery, and in another—registered bonds—for more permanent investment, secure to the holder against the danger of loss or larceny, neither of which could be made a means of passing title to a purchaser except in the mode provided by statute, that is, by a transfer on the books in the Register's Office in the Treasury Department on the evidence required by law and regulations.

(2). The Secretary of the Treasury, charged with the duty of executing the loan acts and of making the transfers, clearly had authority, express as well as implied (Rev. Stat., 161), to require, as evidence of the execution by the payee of the assignment of every bond, the certificate of one of the officers designated by the regulations on the subject, and to make such certificate a condition precedent to the assignment (United States v. Bailey, 9 Pet., 238; Bank v. Lanier, 11 Wall., 376). Regulations have accordingly been prescribed by the Secretary requiring such evidence. (1 Lawrence, Compt. Dec., App., ch. 13, 2d ed., 560.) The effect is to make registered bonds non-negotiable in charac-

ter. A clear purpose is shown to protect the rights of the payee in registered bonds against all the world, until he has parted with them in the form required by statute, and by the evidence required in the regulations. These are evidently not directory, but mandatory. (*Combs v. Hodge*, 21 How., 406; *Bank v. Lanier*, 11 Wall., 378; *Johnston v. Laffin*, 103 U. S., 800; s. c., 5 Dillon, C. C., 65; *Bridgeport Bank v. New York, &c., R. R. Co.*, 30 Conn., 270; *New York, &c., R. R. Co. v. Schuyler*, 34 New York, 30; *Angell & Ames, Corp.*, § 576; *Marlborough Mfg. Co. v. Smith*, 2 Conn., 579; *Northrop v. Newtown and Bridgeport T. Co.*, 3 Conn., 544; *Fisher v. Essex Bank*, 5 Gray, 373; *Shipman v. Ætna Ins. Co.*, 28 Conn., 245.)

The whole purpose of the statute and the regulations would be defeated, and registered bonds would be practically placed on the same footing as coupon bonds, if the equities of the payee were not protected, until the actual transfer on the books of the Treasury Department was made.

The payee in a registered bond might, under certain circumstances, by an execution and acknowledgment of an assignment thereof in blank, estop himself from denying the right of a *bond fide* purchaser for value before maturity in the usual course of business, to a transfer on the books of the Treasury Department, especially if the blank were filled in with the name of such purchaser, who had no knowledge that it was so filled in without the authority of the payee thereon. A bond in this condition is *quasi* negotiable. (*Bridgeport Bank v. N. Y., &c., R. R. Co.*, 30 Conn., 251, 273.) But the rights of the purchaser would rest on the estoppel, and not on the negotiable character of the bond. (*Barrett's Case*, ante 200; *Taylor's Case*, ante 190; *Johnson v. Laffin*, 5 Dillon C. C., 76; s. c., 103 U. S., 800; *Webster v. Upton*, assignee, 91 U. S., 70; 3 De Gex & Smale, Ch., 310; *Cavanaugh, Money Securities*, 266; *Burroughs, Public Securities*, 138, 254; *Imperial Land Company of Marseilles*, Law Reports, 11 Equity, 478; *Ex parte Colboone*, Law Reports, 11 Equity, 490; *Bank v. Lanier*, 11 Wall., 374; *Baldwin v. Ely*, 9 How., 600; *De Voss v. City of Richmond*, 18 Gratt., 338; *Comrs. of Knox Co. v. Aspinwall*, 21 How., 539; *Supervisors v. Schenck*, 5 Wall., 772; *Royal British Bank v. Turquand*, 85 Eng. C. L., 248; *Angell & Ames, Corp.*, § 576; *Bridgeport Bank v. New York, &c., R. R. Co.*, 30 Conn., 273; *Redfield, Railways*, § 35; *Hotchkiss v. National Banks*, 21 Wall., 354; *Union Bank v. Laird*, 2 Wheat., 390; *Black et al. v. Zacharie & Co.*, 3 How., 483; *Fisher v. Essex Bank*, 5 Gray, 373; *Field, Corporations*, sec. 110; *Weaver v. Barden*, 49 N. Y., 286; *Cady v. Potter*, 55 Barb., 463; *Smith v. American Coal Co.*, 7 Laus., 317; *Grymes v. Hone*, 49 N. Y., 17.)

The rights of parties in cases of alleged estoppel would doubtless, as a general rule, be left by accounting officers to the determination of the judicial tribunals.

(3.) The approved definitions of negotiability show that registered bonds are not negotiable.

(a.) An instrument is negotiable, when its legal title, and the right or action as to the money thereby payable, may be transferred from one to another, and so on in succession, by indorsement in blank, or in full, and delivery by the holder or by delivery only. (Daniel, Neg. Insts., § 1; Bouvier's Law Dic., Tit. Negotiable).

(b.) A registered bond is not negotiable by indorsement and delivery. The legal title only passes by—(1) indorsement, (2) acknowledgement of the indorsement certified by a designated officer, (3) delivery, and (4) transfer on the books of the Treasury Department, when the evidence of title is (5) a new bond to the holder. It may be, that the requirement of the certificate would not alone destroy the negotiability of an instrument otherwise negotiable, but if not, the requirement of the transfer on the books of the Treasury Department does so.

(c.) An essential element of negotiability is, that the negotiable instrument may pass in succession to any number of persons, and upon the original blank indorsement. This element of negotiability is not found in the definitions of negotiability in all the books on the subject. (1 Daniel, Neg. Insts., § 1.) But it is an element nevertheless. (1 Daniel, Neg. Insts., § 663; *Muldrow v. Caldwell*, 7 Mo., 563; *Lea & Langdon v. Branch Bank of Mobile*, 8 Porter, Ala., 119; *Scull v. Edwards*, 8 Eng., 24; *Blackman v. Green & Short*, 24 Vt., 17; *Potter v. Tyler and another*, 2 Metc., 58).

A registered bond lacks this element. The statute by any fair construction of its language contemplates but one assignment of the same bond. The first assignment requires a transfer on the books of the Treasury Department, which is inconsistent with the idea of successive assignments of the same bond. (1 Lawrence, Comp. Dec., App., ch. 13, 2d ed., 563.) Until such transfer is made, interest checks issue payable to the original payee in the bond. (Rev. Stat., 305, 306, 307, 308, 3646, 3647, 3689; 1 Lawrence, Compt. Dec., App., ch. 13, 2d ed., 560, 565.)

The equitable title may doubtless pass by successive indorsements on a registered bond. (*Baldwin v. Ely*, 9 How., 601; *Williamson v. Thomson*, 16 Ves., 443; *Burroughs*, Public Securities, 252; *Angell & Ames, Corp.*, §§ 564, 565, 566; *Field v. Pierce*, 102 Mass., 261; *Bank v. Lanier*, 11 Wall., 377; *Johnson v. Laflin*, 5 Dillon O. C., 79, and cases cited; *De Voss v. City of Richmond*, 18 Gratt., 351; *Shipman v. Ætna Ins. Co.*, 29 Conn., 245.)

The authorities heretofore cited as to the assignment of choses in action are equally applicable here. But the legal title passes only by the transfer on the books of the Treasury Department, or, perhaps, by the delivery to the Department of the proper evidence authorizing a transfer. (*Combs v. Hodge*, 21 How., 407; *Bank v. Lanier*, 11 Wall., 369; *Attorney-General v. Dimond*, 1 Crompton & Jervis, Exchequer, 356; *De Voss v. City of Richmond*, 18 Gratt., 352; *Davis v. Bank of England*, 2 Bing., 393, 9 Eng. C. L., 444; *New York & N. H. R. R. Co. v. Schuyler*, 34 New York, 7 Tiffany, 30; *Texas v. Hardenberg*, 10 Wall.,

68; *Johnston v. Laffin*, 103 U. S., 800; s. c., 5 Dillon C. C., 65; *Angell & Ames, Corp.*, 576; *Marlborough Mfg. Co. v. Smith*, 2 Conn., 579; *Northrop v. Newtown and Bridgeport T. Co.*, 3 Conn., 544; *Fisher v. Essex Bank*, 5 Gray, 373; *Shipman v. Ætna Ins. Co.*, 29 Conn., 245; *Cady v. Potter*, 55 Barb., 463; *Grymes v. Hone*, 49 N. Y., 17; *Fairfax v. City of Alexandria*, 28 Gratt., 16; s. c., 95 U. S., 774; *Webb v. City Council of Alexandria*, 33 Gratt., 168; *Jones, Railroad Securities*, 202, citing *Weaver v. Barden*, 49 N. Y., 286; 3 Lans., 338; *Dunn v. Commercial Bank of Buffalo*, 11 Barb., 580; *Leitch v. Wells*, 48 N. Y., 585; *Salisbury Mills v. Townsend*, 109 Mass., 115; *Shaw v. Spencer*, 100 Mass., 382; 1 Am. R., 115.) And, when a transfer is thus made and a new bond issued under an assignment, there is authority for saying that the payee therein will hold it free from all equities attaching to the original holder. (*Burroughs, Public Securities*, 252, citing *De Voss v. City of Richmond*, 18 Gratt., 338; *Comrs. of Knox Co. v. Aspinwall*, 21 How., 539; *Supervisors v. Schenck*, 5 Wall., 772; *Royal British Bank v. Turquand*, 85 Eng. C. L., 248; *Cavanaugh, Money Securities*, 266, citing *Higgs v. North Assam Tea Co.*, Law Reports, 4 Exchequer, 387; *In re Hercules Ins. Co.*, Brunton's Claim, Law Reports, 19 Equity, 302; *Ex parte Universal Life Assurance Co.*, Law Reports, 10 Equity, 458; *Field, Corporations*, sec. 125; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y., 616.)

There may be reason in saying that the first holder of a bond transferred on an indorsement may be subject to the prior equities of the indorser to be determined by judicial action, but a *bond fide* purchaser from him for value before maturity would not be so subject. (*Bridgeport Bank v. New York, &c., R. R. Co.*, 30 Conn., 245, 247, 270; *Bank of Kentucky v. Schuylkil Bank*, 1 Pars., Sel. Eq. Cas., 180; *Sabin v. Bank of Woodstock*, 21 Vt., 353; *Jones, Railroad Securities*, 201; *Athenæum Life Assurance Soc. v. Pooley*, 3 De Gex & L., 294; *Texas v. Hardenberg*, 10 Wall., 68.)

If a blank assignment of the bond can operate in any case in favor of successive holders, it is by reason of estoppel, and not by reason of the negotiable character of the instrument. (*Field, Corporations*, sec. 110; *Weaver v. Barden*, 49 N. Y., 286; *Drury v. Foster*, 2 Wall., 33.)

(4). The elementary works on negotiable instruments regard these registered bonds as non-negotiable. Thus a recent valuable work in discussing the character of registered bonds under the act of March 2, 1861, (12 Stat., 178, sec. 2), says:

"The public funds of France, like the registered bonds, are not negotiable. These certificates of debt are called *rentes*, and are inscribed on the great book of the public debt of France. And the holder of these certificates, other than the original owner, must satisfy the public authorities of this title before he can receive payment.

"The peculiar feature of these registered bonds is, that the person in whose name the bond is issued is alone recognized by the debtor as the owner, until the title has been transferred in the mode prescribed by the debtor, and a transfer of the title made on their books, then a new

certificate is issued and the assignee becomes the owner of the legal title.

"Until all these formalities are complied with, although value may have been paid for the bond, and an assignment made on the bond, or by a separate formal assignment, the assignee has only an equitable title. (Burroughs, Public Securities, 252.)

(5). The authority of adjudicated cases leads to the same conclusion. Many of the cases already cited are applicable to this question. The Supreme Court of the United States—the highest authority—has in principle decided the question.

In 1839, Leslie Combs was the owner of, and payee in, certain Texas bonds, in each of which it was provided that "this certificate is transferable by the said Leslie Combs, or his legal attorney or representative, on the books of the stock commission only." Combs indorsed the bonds in blank and delivered them to James Love, his agent, for the purpose only of receiving payment; but Love sold them to Andrew Hodge, a *bond fide* purchaser for value in the usual course of business. The United States having assumed the payment of the bonds, Combs filed a bill in equity against Love and the administrator of Hodge to enjoin them from receiving payment of the money due on the bonds, and to determine the rights of the parties, which was decided in the Supreme Court, December term, 1858.

The court said:

"The title of the defendant [the administrator of Hodge] * * * depends upon the effect to be given to the endorsement of the certificates in blank by the plaintiff, and their deposit with Love. The question is, was he invested with such a title that a *bond fide* purchaser, having no notice of its infirmity, will be protected against a latent defect? The law merchant accords such protection to a holder of a bill of exchange taken in the course of business for value, and without notice; * * *. But this concession is made for the security and convenience, if not to the necessities and wants, of commerce, and is not to be extended beyond them. It is a departure from the fundamental principle of property, which secures the title of the original owner against a wrongful disposition by another person, and which does not permit one to transfer a better title than he has. The party who claims the benefit of the exception to this principle *must come within all the conditions on which it depends.* * * *. When the instrument is one which *by law is not negotiable*, * * *, the rule of the law merchant has no application. The loss of the instrument with the name of the payee upon it, or its transfer by a faithless agent, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an endorsement on such a paper that the holder is entitled to sell or to discount it. (* * *). Nor can the holder write an assignment or guarantee not authorized by the endorser. * * *. In the case before us, the certificates were transferable, in terms only, in a single mode. There was no evidence that a transfer in any other form than that prescribed had ever been recognised. We have considered this cause upon the assumption that the defendant was a holder for value." (Combs v. Hodge, 21 How., 405.)

It is not distinctly stated that the attempted sale to Hodge was before the maturity of the bonds, but the fact is so. The court thus held the

bonds non-negotiable, but, for reasons not now material, remanded the case for a new trial. And see *Baldwin v. Ely*, 9 How., 580, 600, and cases above cited.

The authorities as to the assignment of shares in corporations, which are by statute, or by-laws, transferable only on the books of the corporation, are applicable in principle and lead to the same conclusion. (*Combs v. Hodge*, 21 How., 407, citing *Dunn v. Commercial Bank of Buffalo*, 11 Barb., 580; *Bank v. Lanier*, 11 Wall., 377; and see cases above cited.) It is thus sufficiently shown that registered bonds are not negotiable.

4. Registered bonds, however, have some of the attributes of negotiability.

(1). A *bonâ fide* purchaser of bonds issued to him by duly authorized officers is generally entitled to be protected—(1) against irregularities preceding the issue, and, as it has been held, (2) under certain circumstances, in case a new bond is issued in lieu of one assigned to him and surrendered for reissue, and (3) in some cases of successive transfers of bonds assigned in blank with a duly certified acknowledgment of execution of assignment. (*Burroughs, Public Securities*, 254, citing *De Voss v. City of Richmond*, 18 Gratt., 338; *Bridgeport Bank v. New York, &c., R. R. Co.*, 30 Conn., 270; *Jones, Railroad Securities*, 197–210; *Brice, Ultra Vires*, 2d ed., 304; *Imperial Land Company of Marseilles, Law Reports*, 11 Equity Cases, 478; *Salisbury Mills v. Townsend*, 109 Mass., 115; *Angell & Ames, Corp.*, § 588 *n*; see *Field, Corporations*, secs. 110, 125; *Shaw v. Spencer*, 100 Mass., 382; *Weaver v. Barden*, 3 Lans., 338.) Equity will in some cases follow substituted bonds in the hands of purchasers charged with notice of the rights of prior parties. (*Texas v. Hardenburg*, 10 Wall., 68.)

III. Gibson is not estopped from asserting his rights in the bonds now in question.

1. This is sufficiently shown by the case of *Combs v. Hodge*, 21 Howard, 406, in which it is said:

“When the instrument is one which by law is not negotiable, * * * The loss of the instrument with the name of the payee upon it, * * *, does not impair the title of the owner. Nor can a purchaser safely draw any conclusion from the existence of an endorsement on such a paper that the holder is entitled to sell or to discount it. (* * *). Nor can the holder write an assignment * * * not authorized by the endorser.”

This was said in reference to a registered government bond not in terms payable to “assigns,” but declared therein to be “transferable by the said Leslie Combs, [the payee] or his legal attorney or representative, on the book of the stock commissioners.” This language seems to imply that a purchaser could acquire no right at law until a transfer on the books by Combs in person or by attorney. (See *Marlborough Manufacturing Co. v. Smith*, 2 Conn., 580.) The principle of the case is, that, until the bond is put in a shape to give a holder a legal right, he is not entitled to be protected against equities. Applying this

principle in this case, a holder of the bonds in question is not entitled to protection.

2. If the payee of a registered bond should make an assignment in blank, with a duly certified acknowledgment, and should lose it or intrust it to an agent, and it should pass for value and before maturity into the hands of a *bonâ fide* purchaser in the usual course of business, the latter would upon abstract principles of justice, and, as it would seem, upon authority, be entitled to a transfer thereof as his own on the books of the Treasury Department.

In the case of *Combs v. Hodge*, as already shown, the purchaser was denied protection, because Hodge had not put the bond in a shape to give him the legal title thereto. Other authorities and later cases recognize the principle, that, when the payee, in a registered bond payable to a payee "or assigns," or in a certificate of stock in a corporation in equivalent form, puts it in a shape which conveys the legal title therein, or in a shape which gives a holder a right to demand, of officers of the government in the case of a bond, or of the corporation in the case of the certificate of stock, a transfer to perfect the evidence of legal title, a *bonâ fide* purchaser for value in the usual course of business and before maturity as to a bond is entitled to be protected. The authorities which support this view have already been cited. And see *Field, Corporations*, sec. 110; *Weaver v. Barden*, 49 N. Y., 286; *Bank of America v. McNeil*, 10 Bush., Ky., 54; *Hill v. Newichawanick Co.*, 48 How. Pr., 427; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y., 616; *Mechanics' Bank v. N. Y., &c., R. R. Co.*, 3 Kern., 627. In a proper case presenting this question, it would remain to be determined, whether executive officers should finally decide it, and make payment accordingly, or require parties to secure a judicial determination of their rights.

The claimant in this case is entitled to payment of the bonds now in question.

TREASURY DEPARTMENT,

First Comptroller's Office, November 21, 1882.



IN THE MATTER OF THE CHARACTER AND MODE OF DISBURSEMENT OF THE APPROPRIATION MADE BY THE ACT OF AUGUST 5, 1882, FOR THE OFFICE OF SUPREME COURT REPORTER.—OTTO'S CASE.

1. The public history of the times and the usages of Congress in enacting statutes are elements in the construction of such statutes.
2. When it clearly appears that a provision in an act making annual appropriations, "and for other purposes," was intended as permanent legislation, it is to be so regarded.
3. The provisions in the act of August 5, 1882 (22 Stat., 254), relating to the reporter of the decisions of the Supreme Court of the United States, are permanent legislation.

4. The appropriation therein made is a permanent annual appropriation.
5. The first sentence of section 682 of the Revised Statutes is superseded by the act of August 5, 1882, and the word "five" in said section is stricken out and the word "two" inserted; the effect of which is to require the reports of the decisions of the Supreme Court of the United States to be sold "at a sum not exceeding two dollars per volume."
6. The vouchers submitted by the reporter of the Supreme Court for his salary must be accompanied by evidence of compliance with the statutes regulating his duties.
7. The proper mode of paying the salary of the reporter is by Treasury warrant, issued on a balance certified by the First Comptroller on an account stated and settled by the First Auditor.
8. The clerk-hire, office rent, stationery, and contingent expenses authorized for the reporter by the act of August 5, 1882, may properly be paid through a special disbursing agent appointed by the Secretary of the Treasury.
9. The two modes of making payments of claims allowed against the United States are (1) by drafts issued or cash payments on Treasury warrants, and (2) by checks of disbursing officers or agents on moneys advanced to their credit as such, and deposited in the several sub-treasuries or other designated depositories.
10. There are four classes of persons by whom disbursements are made, to wit: (1) disbursing officers; (2) disbursing clerks; (3) disbursing agents; and (4) "special agents, * * * charged with the disbursement of public moneys."
11. The statutory recognition of a power is generally regarded as equivalent to a grant of the power.

October 16, 1882, Hon. William T. Otto, reporter of the decisions of the Supreme Court of the United States, asked the First Comptroller for an opinion on the questions:

First. Is the appropriation made by the act of August 5, 1882, for salary of reporter, clerk-hire, and contingent expenses, a permanent specific appropriation? and

Second. What is the proper mode of disbursing that appropriation?

The act of August 5, 1882 (22 Stat., 219, 254), "making appropriations for the legislative, executive, and judicial expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes," contains the following provisions:

"That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-three, for the objects hereinafter expressed, namely:

* * * * *

"The reporter of the decisions of the Supreme Court of the United States shall be entitled to receive from the Treasury an annual salary of four thousand five hundred dollars when his report of said decisions constitutes one volume, and an additional sum of one thousand two hundred dollars when, by direction of the court, he causes to be printed and published in any year a second volume, and said reporter shall be annually entitled to clerk-hire in the sum of one thousand two hundred dollars, and to office rent, stationery, and contingent expenses in the sum of six hundred dollars, and an amount sufficient for the payment of said sums is hereby appropriated: *Provided*, That the above pro-

vision shall not apply to decisions of the court pronounced at the last term thereof, but that said decisions shall be printed and the volumes containing them delivered to the Secretary of the Interior, as prescribed by existing laws; and an amount sufficient to pay the salary and compensation of the reporter in connection therewith is hereby appropriated: *And provided further*, That the volumes of the decisions which said court shall hereafter pronounce shall be furnished by the Reporter to the public at a sum not exceeding two dollars per volume, and the number of volumes now required to be delivered to the Secretary of the Interior shall be furnished by the reporter without any charge therefor."

There is no repealing provision in the statute.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

In regard to the first question, it is apparent on the face of the statute that the character of the appropriation clause which relates to the reporter of the decisions of the Supreme Court in the act of August 4, 1882 (22 Stat., 254), should be considered with the provisions with which it is connected.

I. It is well settled, that provisions in appropriation acts, which refer to the particular appropriation made therein, cannot be construed as working by implication a repeal of general laws, or as extending in their application, beyond the time covered by the appropriation act, or to any objects other than those to which such provisions expressly relate. (*Artificial Limbs Case*, 2 Lawrence, Compt. Dec., 397.)

In the case of *Minis v. The United States*, 15 Peters, 445, in which a proviso in an appropriation act had been construed, in departmental practice, as permanent in its operation, the Supreme Court, in deciding that such was not the true construction, and that the proviso in question was "limited exclusively" to the particular appropriation to which it referred, said:

"It would be somewhat unusual to find engrafted upon an act making special and temporary appropriation, any provision which was to have a general and permanent application to all future appropriations. Nor ought such an intention on the part of the legislature to be presumed, unless it is expressed in the most clear and positive terms, and where the language admits of no other reasonable interpretation. * *

* A general rule, applicable to all future cases, would most naturally be expected to find its proper place in some distinct and independent enactment."

This was said in relation to the act of March 3, 1835 (4 Stat., 753), "An act making additional appropriations for the Delaware Breakwater, and for certain harbours, and removing obstructions in and at the mouths of certain rivers, for the year one thousand eight hundred and thirty-five." Since the date of that decision, Congress has, to a larger extent than prior thereto, adopted the practice of engrafting general legislation on annual appropriation acts, with titles declaring that they are passed for the purpose of making appropriations, "and for other

purposes." The act of March 3, 1835, had no such addition to its title. These facts may, to a limited extent, render inapplicable to the act now in question the rule of construction adopted in the early period of the government. This modern practice of inserting permanent provisions in annual appropriation acts is a proper subject of consideration, since a "court, in construing an act, * * * will look, if necessary, to the public history of the times in which it was passed," including the usages relating to the enactment of statutes. (*Aldridge v. Williams*, 3 How., 9; *United States v. Union Pacific Railroad Co.*, 91 U. S., 72; *Minis v. United States*, 15 Pet., 441; *Bishop, Written Laws*, 50, 74, 77, note 6, 92 a.) In view of this practice, it seems reasonable to hold, that, when it clearly appears that a provision in an annual appropriation act was intended by Congress to be permanent general legislation, it should be so regarded.* Adopting this rule, the provisions in the act of August 5, 1882, fixing (1) an annual salary for the reporter of the decisions of the Supreme Court of the United States, and declaring him annually entitled (2) to clerk-hire in a fixed sum, and (3) to office rent, stationery, and contingent expenses in a specified amount, are to be regarded as permanent legislation, until changed by subsequent statute.

1. The language of the act of August 5, 1882, is not reasonably susceptible of any other interpretation. It declares that "the reporter * * * shall be entitled to receive * * * an *annual salary*," the amount of which is therein prescribed, and also "an additional sum" specified "when by direction of the court he causes to be printed and published in *any year* a second volume." The expressions "annual salary" and "in any year," clearly indicate a purpose to make a permanent provision as to the compensation of the reporter. The act declares that "said reporter shall be annually entitled to clerk-hire" in a specified sum, and "to office rent, stationery, and contingent expenses" in a fixed amount. These expressions also clearly indicate a purpose to enact permanent legislation, and they cannot reasonably be construed as applying only to the fiscal year 1883.

2. The permanent character of these provisions is indicated by the provisions of the statutes in relation to the office of the reporter, which were in force when this act was passed.

The Revised Statutes provide as follows:—

"SEC. 677. The Supreme Court shall have power to appoint a clerk and a marshal for said court, and a reporter of its decisions." (See acts of 24th Sept., 1789, sec. 7, 1 Stat., 76; 26 Aug., 1842, sec. 2, 5 Stat., 524; 29 Aug., 1842, sec. 1, 5 Stat., 545; 2 March, 1867, sec. 2, 14 Stat., 433.)

"SEC. 681. The reporter shall cause the decisions of the Supreme Court made *during his office* to be printed and published within eight months after they are made; and within the same time, shall deliver three hundred copies of the volumes of said reports to the Secretary of the Interior. And he shall, in any year when he is so directed by the court, cause to be printed and published a second volume of said de-

* See extract from Finance Report for 1857, foot-note, end of this opinion.

cisions, of which he shall deliver, in like manner and time, three hundred copies." (See acts of 29th Aug., 1842, sec. 1, 5 Stat., 545; 21 May, 1866, sec. 1, 14 Stat., 51; 23 July, 1866, sec. 1, 14 Stat., 191, 205; 2 March, 1867, sec. 10, 14 Stat., 471.)

"SEC. 682. The reporter shall be entitled to receive from the Treasury an annual salary of twenty-five hundred dollars, when his report of said decisions constitutes one volume, and an additional sum of fifteen hundred dollars when, by direction of the court, he causes to be printed and published, in any year, a second volume. But said salary and compensation, respectively, shall be paid only when he causes such decisions to be printed, published, and delivered within the time and in the manner prescribed by law, and upon the condition that the volumes of said reports shall be sold by him to the public for a price not exceeding five dollars a volume." (See acts of 29 Aug., 1842, sec. 1, 5 Stat., 545; 21 May, 1866, sec. 1, 14 Stat., 51; 23 July, 1866, sec. 1, 14 Stat., 191, 205; 2 March, 1867, sec. 10, 14 Stat., 471.)

"SEC. 3689. There are appropriated, out of any moneys in the Treasury not otherwise appropriated, for the purposes hereinafter specified, such sums as may be necessary for the same, respectively; and such appropriations shall be deemed permanent annual appropriations.

* * * * *

"To pay the reporter of the Supreme Court for three hundred copies of the second volume of the decisions of the court."

By the act of August 5, 1882, Congress intended to require the reporter to furnish volumes of reports at \$2 per volume, instead of \$5, as authorized by section 682 of the Revised Statutes; and, as compensation to the reporter for this reduction in the price of the reports, his annual salary was increased, and an allowance for clerk-hire, office rent, and contingent expenses was made. The object of this change is permanent in character, and hence the provisions for executing this object should be construed as having a permanent operation. The policy of the statute was by no means temporary; it did not apply to the current year alone, but was designed to secure a permanent public advantage in the reduced price of volumes of the reports. The provisions referred to are therefore to be regarded as permanent legislation.

3. There is no express repeal of any previously existing statute. As repeals by implication are not favored, the prior statutory provisions remain in force, except in so far as they are clearly superseded by the act of August 5, 1882. Judging by this rule, all prior provisions remain in force, except the first sentence in section 682 of the Revised Statutes, and the provisions fixing the price of the reports at five dollars a volume in the last clause of said section. The vouchers submitted by the reporter for payment of his salary should be accompanied by his affidavit, or other satisfactory evidence of compliance with the requirements of the several provisions of all these statutes which are now in force, as, *e g.*, (1) that the volumes of decisions have been printed and published "within eight months after they are made," (Rev. Stat., 681, 682); (2) that the required number of volumes has been furnished the Secretary of the Interior "without any charge therefor" "within the same time," (Rev. Stat., 681, 682, act August 5, 1882); and (3) that the

volumes of decisions have been, and are, "furnished by the reporter to the public at a sum not exceeding two dollars per volume," (Rev. Stat., 682, act August 5, 1882.) The reporter is not to be paid monthly; but the proper compensation for each volume of reports is to be paid upon performance of the conditions required. (William Lawrence, *Ex parte*, 1 Ohio St., 431.)

The provision for furnishing the reports at a sum not exceeding two dollars per volume is not satisfied when "the public" cannot obtain them at that price.

II. The clause in the act of August 5, 1882, which makes an appropriation for salary, clerk-hire, office rent, stationery, and contingent expenses for the office of the reporter, in the amounts therein specified, is a permanent annual appropriation. Several considerations support this conclusion.

1. The act of March 2, 1867 (14 Stat., 468, 471), entitled "An Act making Appropriations and to supply Deficiencies in the Appropriations for the Service of the Government for the fiscal Year ending June thirtieth, eighteen hundred and sixty-seven, and for other Purposes," provided as follows:—

"That the following sums, or so much thereof as may be necessary, be, and the same are hereby, appropriated for the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and sixty-seven, namely:

* * * * *

"SEC. 10. *And be it further enacted*, That if the Supreme Court shall in any one year direct its reporter to publish a second volume for such year of its decisions, and if such second volume shall be published accordingly, an additional sum of fifteen hundred dollars shall be paid said reporter therefor on the delivery by said reporter to the Secretary of the Interior, for distribution according to existing laws, of three hundred copies of such second volume of said reports; and the amount necessary to pay the same *is hereby appropriated.*"

The substance of the principal provision of this section (10) is carried into and constitutes part of sections 681 and 682 of the Revised Statutes. The clause which makes the appropriation, although found in an act making annual appropriations, "and for other purposes," is in section 3689 of the Revised Statutes herein quoted, regarded as constituting a permanent annual appropriation. The same reasons which operated to classify this clause as a permanent annual appropriation apply to the appropriating clause now in question in the act of August 5, 1882.

The words—"and an amount sufficient for the payment of said sums is hereby appropriated"—employed in the act of August 5, 1882, require this construction. The preceding language specifies what sums are "said sums." It declares that the reporter is "entitled to receive * * * an annual salary" in a specified sum. It declares that "said reporter shall be *annually entitled* to clerk-hire in the sum of one thousand two hundred dollars." The same language is applied to "office

rent, stationery, and contingent expenses" in a specified sum; and then follows the clause appropriating "an amount sufficient for the payment of said sums." Evidently these provisions cannot be limited to one year without doing violence to the ordinary meaning of language. They were enacted by Congress with a knowledge that less explicit language used in the act of March 2, 1867, had been incorporated in the Revised Statutes as a *permanent annual appropriation*. The appropriating clause in the act of August 5, 1882, is used in connection with permanent provisions for salary and expenses, and its construction may not inappropriately be regarded as affected by the maxim *noscitur a sociis*. This clause is, therefore, to be deemed as making a permanent annual appropriation.

The question as to the mode of disbursement, is one to which the rulings in Senate-Disbursement Case (2 Lawrence, Compt. Dec. 404) apply.

I. A proper mode of disbursing the appropriation made by the act of August 5, 1882, for the office of reporter of the Supreme Court will be, (1) to pay the salary by warrant on the Treasurer, issued on a balance certified by the First Comptroller, on an account stated from time to time and settled by the First Auditor, and (2) to pay the clerk hire, office rent, stationery, and contingent expenses through a special disbursing agent. Either mode might properly be adopted as to both classes of payments; but the modes, as stated, would seem to be most convenient and appropriate.

II. There are two modes of paying claims against the United States.

1. A claimant may present his claim to the proper Auditor, who then states an account therein and makes a report thereof to the Commissioner of Customs, or proper Comptroller, as the case may be. The latter, when satisfied of the correctness of the report, certifies a balance due, on which a warrant to the Treasurer of the United States issues, directing the payment of the balance so certified as due. The Treasurer then makes payment in money or by draft. (Rev. Stat., 236, 248, 269, 273, 277, 305, 306, 307, 308, 316; Senate-Disbursement Case, 2 Lawrence, Compt. Dec., 404; McKnight v. United States, 13 Ct. Cls., 302, 304; s. c., 98 U. S., 179.)

2. A great variety of classes of claims are paid by (1) disbursing officers (Rev. Stat., 235, 305, 351, 524; act March 3, 1881, sec. 2, 21 Stat., 385); (2) disbursing clerks, (Rev. Stat., 176, 201, 215, 235, 351, 393, 416, 440, 496, 522); (3) disbursing agents (Rev. Stat., 255, 3144, 3657, 3658, 4839); and (4) "special agents, * * * charged with the disbursement of public moneys." (Rev. Stat., 3614.)

Disbursing officers and disbursing clerks are generally appointed as such; disbursing agents are generally appointed as such, or have duties as such by virtue of appointment to some office; while "special agents, * * * charged with the disbursement of public moneys" are not generally appointed by virtue of any express statutory authority, but by heads of executive departments, respectively, who are charged with the duty of expending money under appropriation acts; and have, as

incident to such duty, the power to appoint such agents, upon the well known principle in the law of official agency, that when an officer is charged by statute with a duty, and the means of executing it are not specified, he has implied authority to employ the usual or necessary agents and means for that purpose. (Story, Agency, § 58; Birch's Case, 1 Lawrence, Compt. Dec., 154; Strother v. Lucas, 12 Pet., 410.) This implied authority is recognized and regulated by statute. (Rev. Stat., 3614, 3648.) The statutory recognition of a power is generally regarded as equivalent to a grant of the power. (Proceeds of Sales Case, ante 36; State v. Miller, 23 Wisc., 634; 15 Op. Att. Gen., 322; Const. U. S., Art. 1. sec. 9; 2 Story, Constitution, § 331; Gibbons v. Ogden, 9 Wheat., 216.)

The application of these principles to the act of August 5, 1882, shows that the Secretary of the Treasury may appoint a special agent to be charged with the duty of making the disbursements now in question. That act requires payment "from the Treasury;" the Secretary is the chief executive officer of the Treasury Department—(Rev. Stat., 233, 248, &c.)—hence, as the specific mode of making payment is not prescribed, the Secretary has implied authority to direct that the disbursements be made in either or both of the modes stated. His authority is recognized in the provision made for "the fulfillment of the public engagements." (Rev. Stat., 3614, 3648.)

3. As to the salary of the reporter, it would be more in accordance with usage, and better secure the proper supervision over his right to payment, to pay the same by warrant on the Treasurer on a balance certified by the First Comptroller. The other expenses may be more conveniently paid by the appointment, on the execution of a proper bond, of Mr. Otto, or other person, as special agent charged with the duty of disbursing the money appropriated therefor. (Rev. Stat., 3614.) The accounts of such agents are required to be rendered monthly, and, when so rendered, settled quarterly by the proper accounting officers of the Treasury Department. (Rev. Stat., 3622.)

The reporter of the decisions of the Supreme Court of the United States will be advised accordingly.*

TREASURY DEPARTMENT,

First Comptroller's Office, November 3, 1882.

* The Secretary of the Treasury in a letter to the First Auditor, dated June 30, 1857, with his annual report of December 8, 1857, discusses the question how far provisions found in appropriation acts are to be regarded as permanent legislation. He says (page 86):

"The act of March 3, 1845, which was 'An act making appropriation for the civil and diplomatic expenses of the government for the year ending the thirtieth June, eighteen hundred and forty-six, and for other purposes,' provides, in the second section of the act, 'that no part of the appropriations which may be made for the contingent expenses of either House of Congress shall be applied to any other than the ordinary expenses of the Senate and House of Representatives, respectively, nor as extra allowance to any clerk, messenger, or attendant of the said two houses, or either of them, nor as payment or compensation to any clerk, messenger or other attendant

[to] be so employed by a resolution of one of said houses, nor in the purchase of books to be distributed to members.' The language of this law is plain, positive, and unequivocal, and, if in force, forbids in express terms the allowance which has been paid in the cases under consideration. If this law is held to be in existence, then the accounting officers of the treasury should refuse to allow credit to disbursing officers, both of the Senate and House, for any payment made by them *out of the contingent fund*, either for 'extra allowance to any clerk, messenger, or attendant' of either house, or 'for payment or compensation to any clerk, messenger, or attendant employed by a resolution of one of said houses.' The only question for the consideration of the department is the one suggested above. Is the second section of the act of March 3, 1845, in force? The only reason given to show that it is not is that it is a provision in an appropriation bill, and expired with the fiscal year for which appropriations were made in that bill. The fact that it is contained in an appropriation bill is not sufficient to justify the conclusion that the law is temporary and not permanent in its character. There is nothing in the language of the law which would indicate the intention of Congress to limit its operation to the then succeeding fiscal year, and its just and wise provisions are as applicable since that year as before. There is nothing peculiar to the fiscal year ending the thirtieth June, eighteen hundred and forty-six, which would have called for such enactment, and rendered its future operation improper and unnecessary. I am not left, however, to rely alone upon my own judgment in deciding this point. The question has been thoroughly considered by our predecessors, and opinions similar to the one I have indicated given and acted upon by them. I find the following one, given by Mr. Whittlesey, when acting as First Comptroller, on a similar case.

" 'This provision is inserted in an appropriation act, but it is a distinct and substantive enactment, and is as permanent as any other law. As doubts have been entertained on this point, the question will be examined somewhat at length.

" 'In former times it was the custom in Congress, as well as in England, to confine every statute to one subject-matter; to insert nothing in it not germane to its general character and object, and to use provisos as qualifications of and limitations to the general enactments in which they may be inserted, and to those only, and not apply them as limitations to or qualifications of other statutes. But the pressure of legislation in Congress has been so great during the past ten or fifteen years, and the difficulty of passing any general statutes by themselves, altering the former laws, has been so insuperable, that the custom has crept in from apparent necessity of engrafting such enactments upon the general appropriation acts, either in the form of provisos or as distinct sections.

" 'When such enactments are contained in distinct sections in an appropriation act or other statutes there is no room for a question that the words contained in them should receive the same interpretation and construction as if they were used in a statute by itself separate and distinct from any other matter or subject, and when a substantive provision is inserted in an appropriation act or other act of Congress in the form of a proviso, the words and phraseology should all be taken together, and if they indicate or imply an intention of Congress to limit the operation of such proviso to the subject-matter of the statute, and the time during which the enacting clauses of it are to have effect, then the proviso should be so limited. If, on the contrary, the words of such proviso are not specially limited to the enacting sections of the statute, but general, refer to the future without limitation as to time and contain the word hereafter, or its equivalent, and the verbs are in the future tense, the proviso should be regarded as of a general and permanent character.

" 'The same construction and interpretation should be applied to provisos as to independent sections in a statute.

" 'We have many instances of recent date where such general constructions have been put upon provisos by the Attorneys General.

" 'The first section of the civil and diplomatic appropriation act of March 3, 1841, contains a proviso limiting the fees of district attorneys, clerks, and marshals in certain cases, which has been construed by Attorneys General Crittenden and Legaré to be a permanent limitation, and not confined to the year in which it was passed nor to the appropriation to which it was annexed.—See Mr. Crittenden's opinion of April 13, 1841, and that of Mr. Legaré of December, 1841, given in answer to certain questions made by the acting Comptroller; see also the proviso on the same subject contained in the 167th paragraph of the appropriation act of May 18, 1842.

" 'The same act (paragraph No. 202) contains certain limitations of compensation to certain officers in the Post-Office Department, much of which would have no meaning or operation whatever unless such general construction is given to it. The 212th paragraph of the same appropriation act contains a proviso authorizing transfer of funds from one to another head of appropriation in the Post-Office Department. All, or nearly all, the provisions of law made from 1839 to the present time to prohibit extra compensation, to limit fees and compensation, and to prevent a double compensation, or two salaries, have been contained in appropriation acts.—See the 3d

section of the civil and diplomatic appropriation act approved March 3, 1839, which prohibits extra allowances to disbursing officers, and limits expenditures for newspapers.—See the 2d section of the military appropriation act of August 23, 1842, which contains limitations and prohibitions of extra allowances of a more general and extensive character; see, also, section 12 of this same act of August 26, 1842, which contains still further limitations for extra services where one officer performs the duties of another.—See, also, the 4th section of the civil and diplomatic appropriation act of March 3, 1849, (Sess. Laws, p. 68,) which contains a still further limitation as to salaries.

“ ‘The appropriation act of September 30, 1850, (Sess. Laws, p. 174,) contains an appropriation for Richard Rush, with a proviso attached to it prohibiting the accounting officers in future from allowing any officer two salaries for performing the duties of two offices at the same time. Every word of that proviso will be inoperative if it is confined to the appropriation to which it is attached.

“ ‘These numerous provisos and sections of a general character contained in appropriation acts satisfy me that they should be interpreted and construed in the same manner as if each one was contained in the enacting clause of a distinct act.’ ”

“I have given this opinion of Mr. Whittlesey at length because it contains many important references bearing upon the question. It was submitted at the time to Mr. Attorney-General Crittenden, who concurred in the construction placed by Mr. Whittlesey upon the act then under consideration.—(Attorney-General's Opinions, vol. 5, p. 273.)

“Why the same doctrine was not applied to the act of March 3, 1845, I cannot understand. I confess that I am unable to draw a distinction between the cases; and I feel quite confident that if this law had been submitted at the same time to the Attorney-General, he would have given the same opinion in reference to it that he did in the case cited. I concur with him most fully in the construction he gave to the act of 1842, and I have no doubt he would concur with me in applying the same reasoning to the act of 1845.

“My opinion, then, is, that the second section of the act of 1845 was intended to be permanent and not temporary; that it is now in force, and must be applied by the accounting officers of the treasury to all cases coming within its provisions.

“The only additional reason which has been suggested for a different construction is the fact that a different rule has been acted upon both in Congress and in this department. I admit the force of this suggestion, and feel great reluctance in overruling a practice that has continued for so many years.

“If I could find any evidence that the question had been the subject of serious consideration, and an opinion pronounced formally upon it and acquiesced in, I should hesitate long before resorting to a new construction of the law. But such is not the case.”

IN THE MATTER OF THE RIGHT OF THE SAME PERSON TO RECEIVE THE COMPENSATIONS PRESCRIBED BY LAW FOR THE TWO POSITIONS OF (1) SECRETARY TO THE SCHOOL TRUSTEES, AND (2) CLERK TO A SUPERINTENDENT OF PUBLIC SCHOOLS IN THE DISTRICT OF COLUMBIA.—RHEEM'S CASE.

1. A person who holds two distinct compatible offices may lawfully receive the salary of each.
2. A person in the public service, who is designated in an act of Congress as an officer, may be regarded as such, although not in the technical legal sense an officer, when such intent is clearly shown in the act.
3. The positions of (1) secretary to the school trustees of the District of Columbia, and (2) clerk to a superintendent of public schools in said District, are not offices in the technical legal sense.

4. The word "officer" in section 1765 of the Revised Statutes, which prohibits officers and persons in the public service, whose salary or compensation is fixed by law or regulations, from receiving additional compensation, is therein used in its technical, legal, and constitutional sense.
5. The secretary to the school trustees of the District of Columbia, and the clerk to a superintendent of public schools in said District, are persons in the public service within the meaning of section 1765 of the Revised Statutes.
6. Under section 1765 of the Revised Statutes the Commissioners of the District of Columbia are prohibited from paying to one person the compensations prescribed by law for the services of the two positions of secretary to the school trustees of the District of Columbia and clerk to a superintendent of public schools in said District.
7. The District of Columbia appropriation act of March 3, 1881 (21 Stat., 464), was not intended to give to unofficial employes in the District government the position of officers, entitled to the salaries of two offices, under section 1765 of the Revised Statutes. This results from two considerations: (1) To so hold, would make the appropriation act repeal or modify as to such employes the provisions of section 1765 of the Revised Statutes by implication, and such repeal is not favored, nor are there any words employed to indicate an intention to make such repeal. (2) Said section 1765 has prescribed a general rule for construing appropriation acts in such cases, which forbids the idea of a repeal as to such employes by the act of March 3, 1881.

The act of March 3, 1881 (21 Stat., 458, 464), "making appropriations to provide for the expenses of the government of the District of Columbia for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, * * *," contains the following provisions:

PUBLIC SCHOOLS, DISTRICT OF COLUMBIA.

For salaries of superintendents, teachers, and janitors, secretary of the board, and clerks, including additional teachers and increase of teachers' pay by continuous service, rents, repairs, furniture, books, stationery, and miscellaneous items, three hundred and ninety-nine thousand nine hundred and eighty dollars, namely:

For officers: For one superintendent at two thousand seven hundred dollars; one superintendent at two thousand two hundred and fifty dollars; one secretary at one hundred and fifty dollars; one clerk to committee on accounts at three hundred dollars; one clerk at eight hundred dollars; one clerk at seven hundred and fifty dollars; in all, six thousand nine hundred and fifty dollars.

The provision, "one secretary at one hundred and fifty dollars," was for a secretary to the school trustees created by act of June 11, 1878 (20 Stat., 107, sec. 6), and the provision, "one clerk at seven hundred and fifty dollars," was for a clerk to a superintendent of the public schools. Said secretary and clerk were, and could only be, appointed by the Commissioners of the District of Columbia. (Act June 11, 1878, 20 Stat., 104, 107, secs. 3, 6.)

August 1, 1881, the Commissioners of the District of Columbia paid O. B. Rheem \$75, for services for one month, July, 1881, as "secretary of the board [of school trustees] and clerk to superintendent" of public schools. This sum included \$62.50, for services as clerk, and \$12.50,

for services as secretary. In settling the accounts of disbursements made by the Commissioners of the District for the fiscal year which ended June 30, 1882, the question is presented, whether the voucher for said item of \$75 can be allowed in full; in other words, was Mr. Rheem permitted by law to receive the two items of compensation?

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Section 1765 of the Revised Statutes provides that—

“No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.”

It is well settled that a person who holds two distinct compatible offices may lawfully receive the salary of each. (*Bender's Case*, 1 Lawrence, Compt. Dec., 323; *Herndon's Case*, *Id.*, 50.) If Mr. Rheem held an office as secretary to the school trustees, and another office as clerk to a superintendent of public schools, he was lawfully entitled to receive the money paid him. But he was not an officer, because he was not appointed by the President, a court of law, or the head of a department. (Const. U. S., Art. II, Sec. 2; *United States v. Germaine*, 99 U. S., 508; 15 Op. Att. Gen., 187.) The appropriation act of March 3, 1881 (21 Stat., 464), purports to make appropriations “for officers,” and under this caption includes the secretary and clerk mentioned. A statute may describe an employé as an officer, and for some purposes he may be so regarded, especially for the purposes of the act which so classifies or designates him; but, it cannot, by designating an employé as an officer, make him, either technically or in fact an officer within the meaning of the Constitution, or within the meaning of an act applying to officers, which was intended to designate them as such in the technical legal sense of the word. The character of a public service is to be determined by what it is in legal effect, and not by what it is called. A misnomer has no power to duplicate the error. If, therefore, section 1765 of the Revised Statutes uses the term “officer” in its technical, legal, and constitutional sense, then Mr. Rheem is not an officer within the meaning of that section. It is clear that it does use it in the constitutional, legal sense. This is apparent from the language of the section. It declares that “no officer in any branch of the public service, or other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation.” The distinction between officers and other persons in the public service is fully recognized and provided for. The term officer is a technical word, and a rule of construction declares that “if technical words are used, they are to be taken in a technical sense, unless

it clearly appears from the context or other parts of the instrument that the words were intended to be applied differently from their ordinary or their legal acceptation." (1 Kent, Com., 462; *McCool v. Smith*, 1 Black, 459; *Fashion v. Wards*, 6 McLean, C. C., 152; *Curtis v. Martin*, 3 How., 106, *Lawrence v. Allen*, 7 *Id.*, 785; *Bacon v. Bancroft*, 1 Story, C. C., 341; *Lee v. Lincoln*, *Id.*, 610; *United States v. 112 Casks of Sugar*, 8 Pet., 277; *Elliott v. Swartwout*, 10 *Id.*, 151; *200 Chests of Tea*, 9 Wheat., 430; *State v. Gupton*, 8 Ired. L., 273; *United States v. Breed*, 1 Sumner, 159; *Bishop*, *Written Laws*, 96, 97, 99, 100, 204, 224; *State v. Smith*, 5 Humph., 394; *Burton v. Reeve*, 16 M. & W., 308; *Caldwell's Case*, 19 Wall., 264; *United States v. Sarchet*, Gilpin, 273; *United States v. Germaine*, 99 U. S., 510; *Clark v. City of Utica*, 18 Barb., 451; *Sedgwick*, *Construction Stat. and Const. L.*, 2d ed., 221, citing *Merchants' Bank v. Cook*, 4 Pick., 405; *Snell v. Bridgewater Cotton Gin Mfg. Co.*, 24 Pick., 296; *Ex parte Hall*, 1 Pick., 262; *Macy v. Raymond*, 9 Pick., 286; *United States v. Jones*, 3 Wash., C. C., 209.)

Mr. Rheem was not an officer within the meaning of section 1765 of the Revised Statutes. He was, however, a "person" in a "branch of the public service." The principle which determines this has already been decided. (Clerk's case, 1 Lawrence, Compt. Dec., 305; *Cox's Case*, 14 Ct. Cl., 513; *Barnes v. District of Columbia*, 91 U. S., 540.) The government of the District of Columbia, and all its officers and employés, derive their authority from a public act of Congress. (Act June 11, 1878, 20 Stat., 102.) This government was established for public purposes. The service which officers and employés render therein is in character and purpose a "public service"—as much so as that of the judges of the courts, marshal, and other officers in the District of Columbia under the authority of other statutes, though not now, perhaps, strictly a part of its municipal government. (Rev. Stat., relating to Dist. Col., 750, 928.) A service which is part of the government under the authority of Congress is public, whether it be local or general. The duties of a light-house keeper are even more local in character than those of officers and employés of the District of Columbia (Rev. Stat., 4673), yet they belong to and are a part of "the public service."

The compensation of the secretary to the school trustees for the fiscal year which ended June 30, 1882, was fixed by law, and so was that of the clerk to a superintendent of public schools. Section 1765 of the Revised Statutes expressly prohibits such secretary, who is a person in the public service, from receiving any compensation other than that appropriated for the secretary. This subject has been much discussed elsewhere, with results leading to the conclusion stated. (10 Op. Att. Gen., 438; *Bender's Case*, 1 Lawrence, Compt. Dec., 323, 400, 1st ed.) There is no escape from this result, unless the appropriation act of March 3, 1881, by designating the secretary and the clerk referred to as officers, was designed to put them on the footing of officers, in a technical sense, so that one person might lawfully perform the duties of,

and receive the compensation provided for, both positions. This cannot be so, for sufficient reasons:

1. It would make the appropriation act operate as a repeal of section 1765 as to the secretary and clerk mentioned. There is no express repeal as to such secretary or clerk. Repeals by implication are not favored. (*McCool v. Smith*, 1 Black, 470; *Snell v. Bridgewater, &c., Co.*, 24 Pick., 297.) This is especially so in construing an appropriation act. (*Artificial Limbs Case*, 2 Lawrence, Compt. Dec., 382.) There is clearly no such repeal.

2. Section 1765 of the Revised Statutes has prescribed a general rule of construction for appropriation acts in such cases as this, which excludes any repeal, *quoad hoc*, by implication. It declares that no person in the public service, whose compensation is fixed by law, shall receive an additional compensation for any other service, unless the same is authorized by law, "and the appropriation therefor explicitly states that it is for such additional * * * compensation."

The sum of \$12.50 paid to Mr. Rheem for services as secretary for July, 1881, was paid in violation of law, and must be deducted from the amount of the voucher for \$75 in the settlement of the accounts of the Commissioners of the District.

TREASURY DEPARTMENT,

First Comptroller's Office, November 25, 1882.

IN THE MATTER OF THE COMPENSATION FOR PUBLISHING PROPOSALS FOR CARRYING MAILS.—LAKE'S CASE.

1. In 1875 the Postmaster-General requested the publisher of the Jackson Times and Republican to publish in said newspaper proposals for carrying the mails in Mississippi, provided he would do so for \$523.12, which the publisher accordingly did, and he was paid said sum, which he alleges he received under protest. He presented his claim to the [Sixth] Auditor of the Treasury for the Post-Office Department for \$478.16, which he claimed as an additional sum due, at the rate prescribed under section 3923 of the Revised Statutes, by the Clerk of the United States House of Representatives for such publication. *Held*: (1.) Section 3923 of the Revised Statutes does not authorize the Clerk of the United States House of Representatives to prescribe the compensation to be paid for publishing proposals for carrying the mails. (2.) Section 3941 of the Revised Statutes authorizes the Postmaster-General to contract for publishing proposals for carrying the mails. (3.) The Postmaster-General having offered a fixed sum to the publisher of the Jackson Times and Republican for publishing proposals for carrying the mails in Mississippi, under which the notice was published, said sum is all that can be lawfully paid.
2. General terms and phrases in a statute are ordinarily to be construed in a general and comprehensive sense.
3. But when a special provision is made in a statute for a special subject-matter, such special provision controls, and excludes such matter from the operation of another provision sufficiently general in terms to include and regulate it.

4. Section 3823 of the Revised Statutes authorizes the Clerk of the United States House of Representatives to select newspapers, in certain States, in which it declares "all such advertisements as may be ordered for publication * * * by any United States court or judge thereof, or by any officer of such courts, or by any executive officer of the United States, shall be published, the compensation for which * * * shall be fixed by said clerk," &c. Section 3941 requires the Postmaster-General to give public notice of proposals for carrying the mails "in one or more * * * newspapers published in the State or Territory where the service is to be performed," and to "direct, by special order in each case, the newspapers in which * * * [such] proposals * * * shall be advertised."
- Held:* (1.) The general provisions of section 3823 are so restrained in their operation by section 3941 as not to apply to newspapers in which proposals for carrying the mails are published nor to the compensation to be paid for such publication. (2.) Under section 3941 the Postmaster-General had authority to select the newspapers in which proposals for carrying the mails were to be published, and to agree upon the compensation to be paid therefor.

In 1875 the Jackson Times and Republican, of Mississippi, conducted by John L. Lake, proprietor, was one of the newspapers selected by the Clerk of the United States House of Representatives to publish the laws and advertisements ordered by executive officers, with compensation fixed by said Clerk at one dollar per square of nonpareil type.

In said year the Postmaster-General sent to the proprietor of said paper an advertisement for proposals to carry the mails in Mississippi, with a request to publish it in said paper, provided it could be published for \$523.12; and if not, to omit its publication. The advertisement was published upon this request. Lake claims that he protested against the right of the Postmaster-General to prescribe a compensation less than that fixed by the Clerk of the House of Representatives, and that he received payment of said sum of \$523.12 under protest. He presented his claim to the Auditor of the Treasury for the Post-Office Department for payment of \$478.16, the difference between the amount paid for the publication of said advertisement and the amount due therefor at the rate fixed by the Clerk of the House of Representatives, and the claim was rejected on October 31, 1882, by said Auditor. Lake appealed from this decision to the First Comptroller in the Department of the Treasury.

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The acts of March 2, 1867 (14 Stat., 466, sec. 7), and March 29, 1867 (15 Stat., 7, sec. 2), contain provisions carried into the Revised Statutes as follow:

"SEC. 3823. The Clerk of the House of Representatives shall select in Virginia, South Carolina, North Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, and Arkansas, one or more newspapers, not exceeding the number allowed by law, in which such treaties and laws of the United States as may be ordered for publication in newspapers according to law shall be published, and in some one or more of which so selected all such advertisements as may be ordered for publica-

tion in said districts by any United States court or judge thereof, or by any officer of such courts, or by any executive officer of the United States, shall be published, the compensation for which, and other terms of publication, shall be fixed by said Clerk at a rate not exceeding two dollars per page for the publication of treaties and laws, and not exceeding one dollar per square of eight lines of space, for the publication of advertisements, the accounts for which shall be adjusted by the proper accounting officers, and paid in the manner now authorized by law in the like cases." *

The act of June 8, 1872 (17 Stat., 313, sec. 243), contains a provision carried into the Revised Statutes as follows:

"SEC. 3941. Before making any contract for carrying the mail, other than those hereinafter excepted, the Postmaster-General shall give public notice by advertising once a week for six weeks in one or more, not exceeding five, newspapers published in the State or Territory where the service is to be performed, one of which shall be published at the seat of government of such State or Territory; and such notice shall describe the route, the time at which the mail is to be made up, the time at which it is to be delivered, and the frequency of the service; and the Postmaster-General shall direct, by special order in each case, the newspapers in which mail-lettings, or other proposals relative to the business of his department, shall be advertised, and no publisher shall be paid for such advertisements without having been requested by the Postmaster-General to publish the same." †

These sections are permanent legislation. The Revised Statutes have made them so, whether the original statutes from which they are taken were designed to be so or not. (Rev. Stat., 5595. See 15 Op. Att. Gen., 528.)

If section 3823 of the Revised Statutes applies to and controls the advertising done in this case, under section 3941, then it was the duty of the Postmaster-General (1) to advertise for proposals for carrying mails in a newspaper selected by the Clerk of the House of Representatives, and (2) to pay the price fixed by the Clerk. If, however, such advertising is excepted by section 3941 from the operation of section 3823, then the Postmaster-General could have selected any newspaper, subject to said section, and fixed the price to be paid for the advertising.

Section 3823 is sufficiently common in its terms to include the Postmaster-General in the expression "any executive officer of the United States," and to include the advertising in question in the expression "all such advertisements as may be ordered for publication * * * by any executive officer." It is a general rule, that general terms and

* Section 3823 of the Revised Statutes has been modified by the following provisions: Act March 3, 1875, ch. 128, 18 Stat., 342, sec. 1; act June 20, 1878, ch. 359, 20 Stat., 216; act January 21, 1881, ch. 25, 21 Stat., 317. See Rev. Stat., 3826; 15 Op. Att. Gen., 594.

† Section 3941 of the Revised Statutes has been supplemented and modified by the following provisions: Act March 3, 1875, ch. 128, 18 Stat., 342; act July 12, 1876, ch. 179, 19 Stat., 78; act May 17, 1878, ch. 107, 20 Stat., 62, sec. 4; act June 12, 1879, ch. 20, 21 Stat., 11; act June 9, 1880, ch. 167, 21 Stat., 170; act June 17, 1878, ch. 259, 20 Stat., 141; act January 21, 1881, ch. 25, 21 Stat., 317. See 15 Op. Att. Gen., 594; act March 1, 1881, ch. 96, 21 Stat., 374.

phrases in a public statute are, ordinarily, to be construed in a general and comprehensive sense. The maxim "*generalia verba sunt generaliter intelligenda*" applies in respect of such a statute. The authority of the Postmaster-General to cause the advertisement to be published in this case was not derived from, and is not in any respect controlled by, section 3823. Section 3941 gives an independent authority to the Postmaster-General to advertise, and this carries with it the necessarily incidental right to fix by contract the price to be paid for advertising. This conclusion results from the intention of Congress clearly shown in section 3941. The section 3941 was taken from the act of 1872, later in date than the acts of 1867, from which section 3823 was taken, and this fact may be accepted as one element in reaching the conclusion that the purpose of the later act was to engraft an exception on the former; and so section 3941 is excepted from the operation of section 3823. But the order or date of enactment is not necessarily a controlling element in the conclusion reached from pertinent rules of construction, and the intent of Congress ascertained from the words and purpose of the enactments. If the Revised Statutes had been one original act, the same result would be reached.

Section 3823 applies to officers and advertising in general; section 3941 applies to a particular officer, and a single class of advertisements. In such case the rule of construction applies, "that general words may be qualified by particular clauses of a statute, but * * * a thing which is given in particular shall not be taken away by general words." (Sedgwick, Construction Stat. and Const. L., 2d ed., 361.) This rule is expressed in the civil law by the phrase, *In toto jure generi per speciem derogatur, et illud potissimum habitum quod ad speciem directum est*; and the early common law maxim was, *generalis clausula non porrigitur ad ea quæ specialiter sint comprehensa*. Sedgwick adds to the above: "In conformity to this doctrine it is held that where a general intention is expressed in a statute, and the act also expresses a particular intention, incompatible with the general intention, the particular intention shall be considered as an exception." (Sedgwick, Construction Stat. and Const. L., 361.) Other authorities are cited on this point in *Huidekoper's Case*, Second, ante, 155.

Section 3941 contains inherent evidence that its provisions are excepted from the general restraints and operation of section 3823. The newspapers designated under the latter section are not required to be published "at the seat of government of" any State. The Postmaster-General is required to advertise at least in one newspaper "at the seat of government of" the State in which mail service is required. This shows that the Postmaster-General is not controlled in the selection of newspapers by section 3823. The expression in section 3941, that "the Postmaster-General shall direct, by special order in each case, the newspapers in which mail lettings * * * shall be advertised," indicates an intention to grant a special power, without reserve, qualification, or limi-

tation. If Congress had intended this power to apply only to newspapers selected by the Clerk of the House of Representatives, the act would doubtless have so declared. It is unreasonable to suppose that Congress intended to limit the Postmaster-General to newspapers selected by the Clerk, because such selection might apply to only "one" newspaper in a State, and that "one" hundreds of miles distant from the routes for the required mail service. There is no shadow of reason for holding that the Postmaster-General was in any way controlled by section 3823. (See 15 Op. Att. Gen., 527.) The authority of the Postmaster-General to make a contract for the advertising, and to fix the price, arises as a necessary incident of the power conferred by section 3941 to "give public notice by advertising." (Story, Agency, §§ 57, 58; Otto's Case, *ante*.)

If the rate of compensation prescribed under section 3823 controlled the Postmaster-General, and so fixed the right of the claimant, then the question would be presented, whether the acceptance by the publisher of a less sum under protest, or without protest, did not defeat any claim for further compensation. (United States *v.* Child & Co., 12 Wall., 232; United States *v.* Justice, 14 *Id.*, 535; United States *v.* Clyde, 13 *Id.*, 35; Sweeny *v.* United States, 17 *Id.*, 75; United States *v.* Martin, 94 U. S., 400; Chouteau *v.* United States, 95 *Id.*, 61; Baird *v.* United States, 96 *Id.*, 430; Comstock's case, 9 Ct. Cl., 141; Martin's case, *Id.*, 126; Clark's case, *Id.*, 377; case of Hancox *et al.*, *Id.*, 400; Savage's case, 11 *Id.*, 215; Field's case, 12 *Id.*, 355; Silliman's case, 12 *Id.*, 433; Field's case, 13 *Id.*, 41; Hildeburn's case, 13 *Id.*, 62; Railway Mail Service cases, 13 *Id.*, 199; Pittsburgh, C. & St. L. R. R. case, 13 *Id.*, 314; Baldwin's case, 15 *Id.*, 297; Averill and Miller's cases, 14 *Id.*, 200; Pray's case, 14 *Id.*, 256.)

The action of the Auditor of the Treasury for the Post-Office Department is affirmed, and the appeal is dismissed.

TREASURY DEPARTMENT,

First Comptroller's Office, December 6, 1882.

IN THE MATTER OF THE RIGHTS OF AN ATTORNEY PRESENTING A CLAIM AFTER THE SUSPENSION OR DISBARMENT OF A PRIOR ATTORNEY PRESENTING THE SAME CLAIM.—SUBSTITUTED ATTORNEY'S CASE.

1. On general principles a claimant has a right at any time to revoke the authority of his agent or attorney engaged in prosecuting a claim in the Treasury Department.
2. Under the circular regulations of October 10, 1876, such claimant can only change his attorney "with the consent of the proper officers of the department."
3. When an attorney engaged in prosecuting a claim in the Treasury Department is suspended or disbarred from acting as such by the Secretary, the claimant may employ another attorney to prosecute such claim.
4. Such substituted attorney is subject to the rules relative to the original attorney, and entitled to all the rights of such original attorney, including the right prescribed by regulations "to receive any draft" issued in payment of the claim prosecuted by him.
5. The revocation of the order suspending or disbarring the original attorney in such case does not affect the rights of the substituted attorney.

November 23, 1882, the Third Auditor of the Treasury Department addressed a letter to the Secretary of the Treasury, asking "to be informed in what manner an order rescinding an order which had disbarred an attorney from recognition in this department is to operate upon matters occurring in the interim." The Auditor states that "in such cases—especially where the intervals have been considerable—it often occurs that claimants, presumably learning that their attorneys can no longer act for them, have appointed others; and these others have bestowed time and labor in the prosecution of the claims, often advancing the cases to the point of final adjudication, or even further. It would seem to work hardship if in such cases the rights of the later attorneys should be prejudiced by the rescinding order. It cannot be doubted that when an attorney ceases for any reason to be capable of attending to his client's business, another attorney may be substituted, and that the rights of such substituted attorney should not be impaired by a remote possibility that the former attorney may at some future time regain his capacity." December 4, 1882, this letter was by the Secretary "referred to the First Comptroller for his perusal, or such suggestion, oral or otherwise, as he may see fit to make."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

On general principles a claimant has a right at any time to revoke the authority of his agent or attorney engaged in prosecuting a claim in the Treasury Department. The claimant may become thereby liable to an action by the attorney for any breach of the contract of employment, but this does not affect the power to revoke the authority of the attorney in any case, unless such power be affected by a regulation of the Treasury Department. The circular regulations of October 10, 1876, provide that "the claimant may change his attorney at any time, with the consent of the proper officers of the department." When an attorney, engaged in prosecuting a claim in the Treasury Department, has been suspended or disbarred from the right to act as such by the Secretary of the Treasury, the claimant may, as an original right and of necessity, employ another attorney to prosecute such claim, who then becomes subject and entitled to all the rights of the original attorney. The circular regulations of October 10, 1876, and July 10, 1880, relate to this subject, the former giving the proper attorney "the right to receive any draft" issued in payment of the claim prosecuted by him.*

The revocation of the suspension or disbarment of an attorney previously employed and acting is prospective in its operation, unless otherwise declared in the order of restoration; it has no retroactive operation; it does not deprive the substituted attorney, employed after the suspension or disbarment, of his rights, nor does it, *per se*, restore the

* For these regulations, see *Di Cesnola's case*, 2 Lawrence, Compt. Dec., 2d ed., 146; *McAllister's case*, *Id.*, 167; *Clift's case*, *Id.*, 187.

original attorney to his former status as attorney. The latter might, with the assent of the claimant, return to the prosecution of the claim, but this would not deprive any other attorney of his rights.

The Secretary of the Treasury will be advised accordingly.*

TREASURY DEPARTMENT,

First Comptroller's Office, December 8, 1882.

IN THE MATTER OF REFUNDING TO DISTILLERS A "DEFICIENCY TAX"
UNDER A PRIVATE RELIEF ACT.—ATHERTON & CO.'S CASE.

1. The private act of August 5, 1882 (22 Stat., Private Laws, 81), entitled "An act for the relief of G. W. Thompson and others," authorizes a refund of taxes assessed against distillers therein named (1) in cases of the use of materials for distillation in excess of the estimated capacity of sundry distilleries, and (2) in cases of "deficiency taxes."
2. When a statute is ambiguous, or fairly susceptible of two meanings, one of which would render it unavailing for any purpose, and the other of which would make it operative, the latter is to be preferred.
3. The act of August 5, 1882, in authorizing a refund of taxes "in accordance with the provisions of section six" of the act of March 1, 1879 (20 Stat., 340), refers only to those provisions of said section which relate to refunding, and not to that provision which bars a refunding.
4. In construing a statute, it is competent to trace its history through Congress, but not competent to examine reports of committees made in relation to it to ascertain the opinions of individual members making them as to its meaning and construction:
5. The act of August 5, 1882, is remedial, and to be liberally construed.
6. Whether accidental omissions in a statute may be supplied, or erroneous punctuation materially affecting the meaning of a statute may be corrected—*Quære?*

Under section 3309 of the Revised Statutes a distiller is subject to a "deficiency tax" on spirits produced "less than eighty per centum of the producing capacity of the distillery."

September, 1873, a deficiency tax of \$460.42 was assessed against J. M. Atherton & Co., who, before paying it, filed a claim with the Commissioner of Internal Revenue for remission of the tax, on the ground, that the deficiency resulted from unavoidable accidents. January 19, 1876, this claim was rejected. August 18, 1875, Atherton & Co. paid the tax.

Section 6 of the act of March 1, 1879 (20 Stat., 340), authorizes a refund of a "deficiency tax" in case of "a failure * * * of the distiller to maintain the capacity" of the distillery, "not occasioned by any want of diligence or by any fraudulent purpose," and then contains

* December 9, 1882, the First Comptroller addressed a letter to the Secretary of the Treasury, with an opinion, in substance, as above, which, on the same day, the Secretary referred to the Third Auditor, "with the remark that I [the Secretary] concur in the conclusion of the First Comptroller."

this proviso: "*Provided, That no tax shall be remitted or refunded under the provisions of this section upon any assessment made prior to January first, eighteen hundred and seventy-four.*"

The private act of August 5, 1882 (22 Stat., Private Laws, 81), entitled "An act for the relief of G. W. Thompson and others," provides:

"That the Commissioner of Internal Revenue be, and he is hereby authorized and directed to consider the claims of G. W. Thompson and Company and Henry Large, jr., of Pennsylvania; J. M. Atherton and Company, O. Miller and Brother, and W. S. Hume, of Kentucky; Harrison and Small, of Tennessee; C. Dodsworth, of Ohio; and N. S. Chouteau, surety for H. H. Bodemann of Missouri, for tax paid on excess of materials, or for deficiency, and to refund the same, or such parts thereof as fall within the principles of the decision of the Supreme Court in the case of Stoll versus Pepper, and in accordance with the provisions of section six of an act entitled 'An act to amend the laws relating to internal revenue,' approved March first, eighteen hundred and seventy-nine: *Provided, That the aggregate amount allowed and paid under the provisions of this act shall not exceed nine thousand one hundred and twenty-one dollars and eight cents.*"

October 30, 1882, the Commissioner of Internal Revenue reported to the Secretary of the Treasury that the tax should be refunded to Atherton & Co. November 7, 1882, the Acting Secretary of the Treasury, by letter to the Commissioner of Internal Revenue, advised the payment of the amount. Other material facts are stated in the decision hereafter rendered. The claim was referred to the Fifth Auditor, who reported it to the First Comptroller for action thereon.

George L. Douglass, and Hon. John W. Douglass, for the claimants:—

The private act of August 5, 1882, was passed upon—a report, No. 713, 46th Congress, June 11, 1880, made by Mr. Allison; House Report, No. 130, 46th Congress, January 26, 1881; and House Report, No. 245, 1st session, 47th Congress, February 7, 1882,—all in favor of the claimants, and reciting the facts and legislation on the subject. These reports may be considered in giving construction to the private act. (*Jones v. Blackwell*, 100 U. S., 599; *Blake v. National Banks*, 23 Wall., 307; *Braden v. United States*, 16 Ct. Cl., 389; *State ex rel. New Orleans Pacific Railway Co. v. Nicholls*; Governor, 30 La. Ann., 980.)

A "statute authorizing" a "court * * * to open, re-examine and correct" the accounts of a public officer "is highly remedial, and must be liberally construed." (*White County v. Key*, adm'r, 30 Ark., 603.)

"Upon all acts of the legislature, such construction should be made as that one clause shall not frustrate and destroy, but on the contrary, shall explain and support another." (Smith, Stat. and Const. L., 491, 519, 527, 575, 634, 664, 671, 710; *Cass v. Dillon*, 2 Ohio St., 607; *Dwarris*, Stats., 186.)

A private act should be construed to enable a claimant to recover his whole claim when it is meritorious. (*Cross v. United States*, 14 Wall., 479; s. c., 8 Ct. Cl., 1).

"It is not necessary to give to every word its exact signification * * *, if that signification be inconsistent with other words and other parts of the statute." (*Farden's case*, 13 Ct. Cl., 348).

Construction on ambiguous language should be "consonant to equity, and least inconvenient." (*Kerlin's Lessee v. Bull*, 1 Dallas, 178).

Construction may be made contrary to strict meaning of words. (*Braddee v. Brownfield*, 2 Watts & S., 280; *Levering v. Philadelphia, &c. R. R. Co.*, 8 *Id.*, 459).

The real intention is to prevail over the literal sense. (*People v. Utica Ins. Co.*, 15 Johns., 380; 1 Kent, Com., 510–514; *Gibbons v. Ogden*, 9 Wheat., 189; *Oates v. National Bank*, 100 U. S., 239; *Smith v. The People*, 47 N. Y., 330; *Cearfoss v. The State*, 42 Md., 403; *Bailey v. Commonwealth*, 11 Bush, Ky., 688; *Nichols v. Halliday*, 27 Wis., 406).

The act directs the commissioner to “refund” “the claims of * * * J. M. Atherton and Company” “in accordance with the provisions of section six of an act,” &c. Obviously, the controlling words are “refund” and “claims of * * * J. M. Atherton and Company.” These words are nullified, unless the word “provisions,” is slightly restrained.

A paper from the Internal-Revenue Office is filed, saying:

“This claim could not be allowed under section 6 of the act of March 1, 1879 (20 Stats., 340), without further legislation, because the assessment was made prior to January 1, 1874. The private act of August 5, 1882, is relied on. The words, ‘provisions of this section,’ as employed in the first proviso to section six of the act of March 1, 1879, do not include the provisions of that proviso itself. Said section six, and the private act, are *in pari materia*, and must be considered together.

If the words, ‘provisions of section six,’ as used in Private [act] No. 188, mean the same and no more than the words, ‘provisions of this section,’ as used in the above-named proviso, then the bar created by that proviso is not operative against this claim. It is only by construing them to mean the same and no more, that force and effect can be given to Private [act] No. 188, so far as it relates to this claim, for if those words, ‘provisions of section six,’ clearly include the bar created by the above-named proviso, Private [act] No. 188, brings no relief to these claimants. It gives them nothing to which they were not entitled before its passage.

Such a construction ought to be put upon a statute as may best answer the intention of its makers. If the language of a statute is clear and leads to no absurd results, its obvious meaning should be followed. But where it is ambiguous, it is permitted to go behind the words of the law to ascertain the meaning and purpose of the legislature. This meaning may sometimes be collected from the cause or necessity of the statute; at other times from other circumstances. I think the words of Private [act] No. 188 are sufficiently ambiguous to warrant the Commissioner of Internal Revenue in going beyond the mere letter of the statute in his search for the intention of Congress. Upon reference to the bill (Private No. 188), in the various forms it assumed before its final passage, and to the reports of the committees by which its passage was recommended, it becomes manifest that the leading purpose of the act, so far as it relates to this claim, was to relieve the claim from the statutory bar created by the first proviso to section six of the act of March 1, 1879.”

DECISION BY WILLIAM LAWRENCE, *First Comptroller*:

The “deficiency tax” under consideration was assessed “prior to January first, eighteen hundred and seventy-four,” and for that reason could not be refunded under the sixth section of the act of March 1, 1879, the first proviso to said section declares, “that no tax shall be

remitted or refunded under the provisions of this section upon any assessment made prior to January first, eighteen hundred and seventy-four." It was because of this, and to meet another class of cases, that the private relief act of August 5, 1882, was passed, which authorizes a refund (1) upon "the principles of the decision of the Supreme Court in the case of *Stoll versus Pepper* [97 U. S., 438], and (2) in accordance with the provisions of section six" of the act of March 1, 1879. The principle settled in *Stoll v. Pepper* is, that, "if a distiller uses material for distillation in excess of the estimated capacity of his distillery * * *, but, * * * pays the taxes upon his entire production, he cannot be again assessed * * * on * * * spirits which the excess of material used should have produced, according to the" estimated capacity of the distillery.

The claims of Henry Large, jr., Harrison & Small, W. S. Hume, and C. Dodsworth, named in the act of August 5, 1882, arising upon the use of excess material, clearly fall within the decision in *Stoll v. Pepper*, and so are entitled to relief.

The claims of the other parties named in the act of August 5, 1882, are for a refund of "deficiency tax" properly assessed against them "prior to January first, eighteen hundred and seventy-four," that is, for taxes assessed, because said parties did not, on the materials used, produce spirits to the amount of eighty per cent. of the estimated capacity of their respective distilleries.

The act of August 5, 1882, was, therefore, designed to afford relief in cases of deficiency taxes assessed against parties therein named. It declares, that, in such cases, a refund is to be made "in accordance with the provisions of section six, of an act * * *, approved March first, eighteen hundred and seventy-nine," which is as follows:

"SEC 6. That whenever, under the provisions of section thirty-three hundred and nine of the Revised Statutes, an assessment shall have been made against a distiller for a deficiency in not producing eighty per centum of the producing capacity of his distillery as established by law, or for the tax upon the spirits that should have been produced from the grain, or fruit, or molasses found to have been used in excess of the capacity of his distillery for any month, as estimated according to law, such excessive use of grain, or fruit, or molasses having arisen from a failure on the part of the distiller to maintain the capacity required by law to enable him to use such grain, or fruit, or molasses without incurring liability to such assessment, and it shall be made to appear to the satisfaction of the Commissioner of Internal Revenue that said deficiency, or that said failure, whereby such excessive use of grain, molasses, or fruit arose, was not occasioned by any want of diligence or by any fraudulent purpose, on the part of the distiller, but from misunderstanding as to the requirements of the law and regulations in that respect or by reason of unavoidable accidents, then, and in such case, the Commissioner of Internal Revenue, subject to regulations prescribed by the Secretary of the Treasury is authorized, on appeal made to him, to remit or refund such tax, or such part thereof as shall appear to him to be equitable and just in the premises: *Provided*, That no tax shall be remitted or refunded under the provisions of this section upon any as-

assessment made prior to January first, eighteen hundred and seventy-four: *Provided further*, That no assessments shall be charged against any distiller of fruit for any failure to maintain the required capacity, unless the Commissioner shall, within six months after his receipt of each monthly report notify such distiller of such failure so to maintain the required capacity."

In this section there are (1) provisions for refunding, and then there is (2) a bar in the first proviso excluding from the benefit of such provisions assessments "made prior to January first, eighteen hundred and seventy-four." The inquiry then is presented, what does the act of August 5, 1882, mean in authorizing a "refund * * *, in accordance with the provisions of section six" of the act of March 1, 1879? If the bar is one of the "provisions" which controls the refund, it is clear there can be none.

The acts of March 1, 1879, and August 5, 1882, are *in pari materia*—they are to be construed together. If, in considering them thus, the language employed is clear and unambiguous, it must prevail. But it is not clear; it is not free from ambiguity. It fairly admits of a reasonable doubt whether the bar is intended as one of the provisions which is to control a refund under the act of August 5, 1882. There is sufficient evidence of the intention of Congress without reference to the unsafe method of referring to reports made by committees in favor of the act of August 5, 1882. (Artificial Limbs Case, 2 Lawrence, Compt. Dec., 2d ed., 400.) The cases which may apparently seem to justify a reference to such reports only look to the history or progress of a bill through Congress, but not to the opinions of committees as to the purpose or effect of the measure. (Blake v. National Banks, 23 Wall., 307; Aldridge v. Williams, 3 How., 9; United States v. Union Pacific R. R. Co., 91 U. S., 72; Bishop, Written Laws, 77; Otto's case, *ante*.) And it is not necessary to consider the authority to refer to such reports. The act of August 5, 1882, treats the act of March 1, 1879, as having provisions for a refund, distinct from the proviso bar excepting claims from the benefit of such provisions. Claims for a remission of the deficiency tax had been made under the act of March 1, 1879, and rejected by the Commissioner of Internal Revenue. His judgment had been expressed, and it was useless to appeal to him prior to the act of August 5, 1882, for a refund which involved the same question. This law and these facts may be presumed to have been known to Congress. This history is a legitimate element in construing the act of August 5, 1882. If the bar created by the first proviso of section 6 of the act of March 1, 1879, controls the refund, then the act of August 5, 1882, is without purpose, a mere nullity as to one of the two classes of claims included in it, leaving them in the same position they stood before its enactment; but, by a well-known rule of construction, when a statute is ambiguous, or fairly susceptible of two interpretations, one of which would render it unavailing for any purpose, and the other of which would make it operative, the latter is to be preferred. "*Ut res magis valeat quam pereat.*"

(Sedgwick, Construction Stat. and Const. L., 2d ed., 226, citing *People v. King*, 28 Cal., 265; and *Nichols v. Halliday*, 27 Wis., 406. See Smith, Stat. and Const. L., §§ 527, 528.) Hence to render the act operative and remedial—and being remedial it should be liberally construed (Bishop, Written Laws, 120, 189 *d*, 190, 192, 198)—as to this class of claims we must look to the intention of Congress, which, as ascertained by approved rules of construction and interpretation, will prevail even as against the literal meaning of the words employed. “*Qui hæret in literâ hæret in cortice.*” This intention may be gathered from the title of the act, in these words: “An act for the relief of G. W. Thompson and others;” the word “others” of the title including the other claimants named in the act, and among them Atherton & Co., the claimants herein. “We look to this introductory matter for the general intent of the legislature—the reason and principles on which the law proceeds.” “It may, for example, explain an equivocal expression in the enacting clause.” The recitation in the preamble of a statute explains “the legislative perspective in enacting the statute,” and “the preamble is similar to the title in its effect on the interpretation.” (Bishop, Written Laws, 48, 49, 50, and authorities cited.)

The intention, therefore, of Congress, as clearly expressed in the act of August 5, 1882 was to afford “relief” to certain claimants therein named, among them “J. M. Atherton and Company,” by refunding to them the “tax paid on excess of materials, or for deficiency, * * *, or such parts thereof as fall within the principles of the decision of the Supreme Court, in the case of *Stoll versus Pepper*, * * * in accordance with the [refunding] provisions of section six” of the act of March 1, 1879, and not in accordance with the provision of the first proviso of said section, which bars such refunding.

If this construction is not adopted, the words “J. M. Atherton and Company,” in said act of August 5, 1882, are mere surplusage; Congress meant nothing by using them, and “J. M. Atherton and Company” are afforded no relief, but stand in the same position in respect of their claim as if the act had never been passed. The act of August 5, 1882, is to be construed as authorizing a refund in the class of cases now under consideration, because (1) this act, read in connection with the act of March 1, 1879, is not free from reasonable doubt in interpretation, and (2) in such case a rule of construction requires that it shall be made operative rather than a nullity, (3) especially when, as in this case, the statutes are remedial, and hence to be liberally construed to effect a reasonable object, and because (4) in view of all this it is reasonable to infer that Congress, in giving a right of refund by the act of August 5, 1882, “in accordance with the provisions of section six of” the act of March 1, 1879, intended only to include the refunding provisions, and not the proviso bar, which was in no sense a refunding provision.

A refund will be made accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 11, 1882.

IN THE MATTER OF THE RIGHT OF A REPRESENTATIVE IN CONGRESS, ELECTED TO FILL A VACANCY, TO COMPENSATION PRIOR TO HIS ELECTION.—SHELLEY'S CASE.

1. When the language of a statute is ambiguous, the literal meaning of the words employed may be rejected in order to give effect to the intention of the legislature.
2. Any construction that would lead to absurd consequences should be discarded, and, if a different construction conformable to the legislative intent, clearly expressed, can be reasonably given, it should be adopted.
3. The cause of a vacancy in the office or place of a Representative in Congress is not to be determined by the mere phraseology of a resolution unseating a member, but by the facts which arose to create the vacancy and their legal effect.
4. If the salary prescribed by law for a Representative in Congress has been unlawfully paid to a person having no right to receive it, it may be recovered in an action in the name of the United States.
5. *De facto* officers are not, as a general rule, entitled to payment from the United States of the compensation prescribed by statute. But it is competent for Congress to authorize payment of such compensation to Representatives in Congress having the proper credentials, although subsequently declared not elected, and so the statute has provided.
6. At the regular annual election in Alabama in 1880, Shelley and Smith were opposing candidates in the fourth district for election as Representative in Congress. Shelley was declared elected, received "credentials in due form," and occupied a seat as Representative until July 20, 1882, inclusive. Smith contested the election, and, pending the contest, died May 12, 1882. On July 20, 1882, the House of Representatives decided the contest, by resolving, that Shelley "was not elected * * * , and is not entitled to retain the seat which he now occupies," and that Smith "was duly elected * * * , and, having deceased, the seat is declared vacant." The salary of a Representative was paid to Shelley to, and including, July 20, 1882. In November, 1882, Shelley was elected to fill the vacancy created as above stated, and received the proper credentials; and, he has been paid the prescribed compensation as authorized by section 51 of the Revised Statutes, since July 20, inclusive.

Held: (1.) That Mr. Shelley, under the last election stated, is his own "predecessor" within the meaning of section 51 of the Revised Statutes. (2.) That a person, having under color of right the "credentials in due form" of a Representative in Congress, has a vested right to a seat and the compensation prescribed by law, until such period of the term of office as the House of Representatives shall declare him not entitled to the seat. (3.) That Mr. Smith, having died, could not thereafter be invested with the right to a seat as Representative. (4.) That by force of section 51 of the Revised Statutes, Shelley, after his election in November, 1882, was entitled to compensation as a Representative from July 20, 1882, but not to compensation for the period from May 12, to July 20, 1882.

Charles M. Shelley and James Q. Smith were opposing candidates for election to the place of Representative in Congress from the fourth Congressional district of Alabama at the regular annual election in 1880, after which Shelley was by the proper election officers declared elected; and he accordingly received the certificate of election, or "credentials," in the usual form, entered upon the office, or position, of Representative, and received the compensation prescribed by law from March 4, 1881, to July 20, 1882, both days inclusive. Mr. Smith contested the election in the usual form, but, pending the contest, died May 12, 1882.

July 20, 1882, the House of Representatives passed the following resolution :

"Resolved, That Charles M. Shelley was not elected as a Representative to the Forty-seventh Congress from the fourth Congressional district of Alabama, and is not entitled to retain the seat which he now occupies in this House.

"Resolved, That James Q. Smith was duly elected as a Representative from the fourth Congressional district of Alabama to the Forty-seventh Congress, and, having deceased, the seat is declared vacant."

A special election, ordered by the Governor of Alabama to fill the vacancy caused by the death of Smith, was duly held November 7, 1882, and Shelley was in due time declared elected to fill the vacancy, and received the proper credentials ; and, he has been paid the prescribed compensation, as authorized by section 51 of the Revised Statutes, from July 20, 1882.

December 9, 1882, Hon. Charles M. Shelley presented "to the First Comptroller, for his opinion" as to the legal rights of the claimant in respect of compensation, a statement of the facts, which is in part as follows :

Charles M. Shelley was duly seated as a member of the present Congress upon the certificate of his election by the governor.

His election was contested by James Q. Smith, who claimed that he was duly elected, and that Shelley was not.

Pending the contest, and on the 12th day of May, 1882, Smith died.

On the 20th day of July, 1882, Shelley was unseated by resolution of the House.

A special election was ordered by the governor of Alabama, to fill the vacancy caused by the death of Smith, which was duly held on November 7th, 1882, and Shelley was elected to fill the vacancy. Shelley now holds the seat as the successor of Smith.

His claim is, that, as the successor of Smith to fill the vacancy caused by Smith's death, he is entitled to be paid as a member of the House of Representatives, from the 12th day of May, 1882, the date of Smith's death, under the provision of section 51, Revised Statutes United States.

The resolutions of the House unseating Shelley declared, in effect, first, that he had not been duly elected, and, secondly, that James Q. Smith had been duly elected, but that, in consequence of his death, a vacancy existed. (See Congressional Record for July 21, 1882.)

Sec. 51 expressly provides that where a vacancy occurs in either House of Congress, the person elected or appointed to fill it "shall be compensated and paid from the time that the compensation of his predecessor ceased."

Under sec. 49, Revised Statutes, the salary and compensation to Smith ceased at his death, May 12, 1882.

Consequently, Shelley is entitled to be paid *as the successor of Smith* to fill the vacancy from May 12, 1882, notwithstanding the fact that he may have been paid as a member of Congress from the time of Smith's death to the date (July 20, 1882) when he was unseated. He then received compensation as a member of Congress holding the seat.

But he now appears in a different capacity, viz, as one elected or appointed to fill a vacancy. In this capacity he stands in the same position under sec. 51, Revised Statutes, as though he were a *third*

person not formerly in occupancy of the seat, who had been elected to fill the vacancy. If this were in fact so, there would be no doubt of his right to compensation from the date of Smith's death, *i. e.*, from the day on which Smith's compensation ceased.

Sec. 51 contains no exception as against the unseated member who should be re-elected in a case of the character presented.

Neither does it appear by the record, nor is there authority given to the disbursing officer, whoever he may be, to inquire whether *in a different capacity* Mr. Shelley had not received pay as a member of Congress for a part of the time for which he now claims compensation under the provisions of sec. 51, Revised Statutes.

Under sec. 51, Revised Statutes, he is the person elected to fill the vacancy, and he is entitled *as such person* to be paid from the day when Smith's compensation ceased.

The Charles M. Shelley who now seeks compensation as a member of Congress, as one elected to fill a vacancy, is *a different person in law* from the Charles M. Shelley whose seat was declared vacant.

Respectfully,

C. M. SHELLEY.

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The Revised Statutes contain the following provisions:

SEC. 26. The time for holding elections in any State, District, or Territory for a Representative or Delegate to fill a vacancy, whether such vacancy is caused by a failure to elect at the time prescribed by law, or by the death, resignation, or incapacity of a person elected, may be prescribed by the laws of the several States and Territories respectively.

SEC. 31. Before the first meeting of each Congress the Clerk of the next preceding House of Representatives shall make a roll of the Representatives-elect, and place thereon the names of those persons, and of such persons only, whose credentials show that they were regularly elected in accordance with the laws of their States respectively, or the laws of the United States.

SEC. 38. Representatives and Delegates elect to Congress, whose credentials in due form of law have been duly filed with the Clerk of the House of Representatives, in accordance with the provisions of section thirty-one, may receive their compensation monthly, from the beginning of their term until the beginning of the first session of each Congress, upon a certificate in the form now in use to be signed by the Clerk of the House, which certificate shall have the like force and effect as is given to the certificate of the Speaker; but, in case the Clerk of the House of Representatives shall be notified that the election of any such holder of a certificate of election will be contested, his name shall not be placed upon the roll of members-elect so as to entitle him to be paid, until he shall have been sworn in as a member, or until such contest shall be determined.

The act of March 3, 1875 (18 Stat., 389), provides:

That so much of section thirty-eight of the Revised Statutes as requires the Clerk of the House of Representatives to omit from the payroll of Representatives and Delegates elect to Congress those holders of legal certificates whose election he may be notified will be contested be, and the same is hereby, repealed.

The Revised Statutes, as amended, also provide as follows:

Sec. 39. Each Member and Delegate, after he has taken and subscribed the required oath, is entitled to receive his salary at the end of each month.

Sec. 46. The compensation of Members and Delegates shall be passed as public accounts, and paid out of the public Treasury.

Sec. 47. The salary and accounts for traveling expenses in going to and returning from Congress of Senators shall be certified by the President of the Senate, and those of Representatives and Delegates by the Speaker of the House of Representatives.

Sec. 48. The certificate given pursuant to the preceding section shall be conclusive upon all the Departments and officers of the Government.

SEC. 49. When any person who has been elected a member of or delegate in Congress dies after the commencement of the Congress to which he has been elected, his salary shall be computed and paid to his widow, or, if no widow survive him, to his heirs at law, for the period that has elapsed from the commencement of such Congress, or from the last payment received by him to the time of his death, at the rate of five thousand dollars a year, with any traveling expenses remaining due for actually going to or returning from any session of Congress. [See Act of January 20, 1874, 18 Stat., 4.]

SEC. 50. Salaries allowed under the preceding section shall be computed and paid, in all cases, for a period of not less than three months from the commencement of the Congress.

SEC. 51. Whenever a *vacancy occurs* in either House of Congress, *by death or otherwise, of any member or delegate elected or appointed thereto* after the commencement of the Congress to which he has been elected or appointed, the person elected or appointed to fill it shall be compensated and paid from the time that the *compensation of his predecessor ceased*.

The "sundry civil" appropriation act of August 7, 1882 (22 Stat., 338, 339), provides:

"That the parties named below be allowed the amounts set opposite their names, in full of expenses incurred by them, respectively, in contested-election cases, which amounts shall be immediately available, namely:

"To the estate of James Gillette, one thousand five hundred dollars;
* * * to the widow of James Q. Smith, one thousand five hundred dollars * * *".

In giving construction to the foregoing provisions it is proper to bear in mind some well-settled rules:—"In construing a statute the judges have a right to decide in some cases even in direct contravention of its language," when this admits of reasonable doubt and such construction becomes necessary to give effect to the clearly appearing intention of Congress. (Sedgwick, Construction Stat. and Const. L., 2d. ed., 254).

"Where a statute will operate unjustly, or absurd consequences will follow, if the literal meaning is taken, the intention as gathered from the whole will prevail." (Sedgwick, Construction Stat. and Const. L., 2d. ed., 255, *note a*; *Ex parte*, Ellis, 11 Cal., 222; *State v. Clark*, 5 Dutch., 96.)

"We should discard any construction that would lead to absurd con-

sequences." (*Oates v. National Bank*, 100 U. S., 244; *Smith*, Stat. and Const. L., § 486.)

These rules are cited, not because they are necessary to ascertain, or give effect to, the intention of Congress, as manifest in the statutes referred to, but because they render all the more clear and certain the result which follows from the language and evident purpose of these statutes. The rights of Mr. Shelley alone are now submitted for consideration. These depend mainly on section 51 of the Revised Statutes. The claimant insists that the contestant, Smith, was "his predecessor," and the right of this predecessor to compensation ceased with his death, May 12, 1882. It does not require argument to show that a dead man cannot hold, or be invested with, a right to a seat in Congress.

The statute says, "a vacancy occurs * * * by death." (Rev. Stat., 51, 26). This is true when a Representative *occupying a seat* dies. A vacancy occurs also, when the House of Representatives decides a contest, and declares a sitting member not entitled to a seat, unless some other (living) person is at the same time declared entitled to it. The House resolution of July 20, 1882, did not pretend to invest the dead man with the title to a seat as Representative. On the contrary, it provided that, although "James Q. Smith was [at the election of 1880] duly elected," yet, "having deceased, the seat is declared vacant."

The resolution declared, that "Shelley was not elected * * * and is not entitled to retain the seat which he now [at that date] occupies." This made the vacancy. It is immaterial *what the resolution in terms says* as to *the cause which produced a vacancy*. This is to be determined by the facts which arose to create the vacancy and their *legal effect*. (*Utah case*, 2 Lawrence, Compt. Dec., 562, 595; *Page*, Second Auditor, *v. Hardin*, 8 B. Munroe, 648.)

If it could be true, that Smith was on the day of his death the "predecessor" of Mr. Shelley as a Representative under the recent election, and that on that day Smith's "compensation * * * ceased," then Smith must have been entitled on that day to the salary of a Representative (Rev. Stat., 38), and if so, then, also, during the whole of the period from and including March 4, 1881, because every right which Smith had on the day of his death he had during all the period preceding, back to March 4, 1881. On this theory Mr. Shelley could have had no right to salary from March 4, 1881, to May 12, 1882. All payments to him for that period would have been unauthorized, and he might be required to refund the amount he had received, in an action by the United States against him, if not, by withholding under the general authority to make a set-off, or under act of March 3, 1875 (18 Stat., 481; Rev. Stat., 1766), his salary as it has accrued or may accrue. (*Sanborn's case*, *ante* 205; *Schlesinger v. United States*, 1 Ct. Cl., 16; *Bonnafon's case*, 14 Ct. Cl., 484; *United States v. Bartlett*, Daveis, U. S. Dist. Ct., 9; *United States v. Inhabitants of Waterborough*, *Id.*, 154; *Cary v. Curtis*, 3 How., 236; *United States v. Ferreira*, 13 How., 52, note; *Fenemore v. United States*,

3 Dall., 357; *United States v. City Bank*, 6 McLean, C. C., 130; *The Ariadne, Pet.*, C. C., 455.) But Mr. Shelley was his own "predecessor" in fact, and within the meaning of section 51 of the Revised Statutes. He alone had the proper certificate of election, or, as the statute calls it, "credentials" (Rev. Stat., 31); he alone occupied the seat as a Representative until July 20, 1882, when the House declared that he was "not entitled to retain the seat which he now [at that date] occupies." It is true, the House declared that Mr. Shelley "was not elected," and that Mr. Smith "was duly elected." But, until this *decision* of the House, made by virtue of its constitutional authority (Const. U. S., Art. I, sec. 5), Mr. Shelley had the only legal evidence of an election, and the actual occupancy of the seat, or possession of the office of a Representative, if it may be so called, while Mr. Smith never had either. There is a wide difference between *the election* of a Representative and *the evidence of the election*. There is a wide difference between the *right to a seat* and its occupancy, as this case shows.

By express provisions of the statute Mr. Shelley, holding the "credentials" of a Representative, and he only, was entitled to receive the authorized salary up to the resolution of July 20, 1882. (Rev. Stat., 31, 38, 39, act of March 3, 1875, 18 Stat., 389.) Thus, section 38 of the Revised Statutes says, "Representatives * * * elect to Congress, whose credentials in due form of law have been duly filed * * * may receive their compensation monthly, from the beginning of their term." The statute clearly shows, that, so long as a person holds the proper "credentials," until ousted by the House, he is *the Representative* for all purposes. While he is so regarded, no other person can, in contemplation of law, be so regarded, because there cannot be two Representatives having title to or possession of one and the same office, or position of Representative. Mr. Shelley was the Representative to July 20, 1882; Mr. Smith was not, and, having previously died, never could, after his decease, become a Representative, and, hence, Mr. Shelley was his own "predecessor."

These views are confirmed by an eminent elementary writer, who says of such cases as this: "The person holding the ordinary credentials shall be qualified, and allowed to act pending a contest and until a decision can be had on the merit." (McCrary, Elections, § 204.) "The issuing of a commission [credentials] * * * confers a *vested right* upon the person commissioned, which nothing but a judicial decision [or decision of a contest] can take away." (*Id.*, § 209.) "It is * * * evidence of the right to hold the office; gives *color* to the acts of the incumbent, and constitutes him an officer *de facto*. * * * The person holding the commission being held not elected, by a tribunal of competent jurisdiction, the commission falls to the ground. The person duly commissioned must exercise the functions of the office until, upon an investigation *upon the merits*, it is judicially determined otherwise." (*Id.*, § 210.) "In determining the *prima facie* right to a seat, the House of Representatives will not look behind the certificate, if it be signed by

the proper officers, and if it contains a statement in unequivocal terms of the result of the election." (*Id.*, §§ 216, 221, 222.)

As a general rule, *de facto* officers are not entitled to payment from the United States of the compensation prescribed by statute. (Evans's case, *ante* 111.) But it is competent for Congress to provide by statute for payment to a Representative having the proper credentials, until his right to a seat is ultimately determined, although he is subsequently declared not duly elected; and this is precisely what the law has done.

By force of section 51 of the Revised Statutes, Mr. Shelley, under his election in November, 1882, was entitled to receive, as he did, the compensation of a Representative from and after July 20, 1882, but not for the preceding period back to May 12, 1882, during which he had already been paid such compensation. It may be well said, that a construction of the statute, which would give *double pay* during this preceding period to the claimant, would lead to an absurd result. It cannot reasonably be supposed that Congress intended to give double pay to one who, as the House resolution declared, "was not elected as a Representative" for the term including that period, but who had, nevertheless, held the seat and been once paid.

The view thus presented is the one most favorable to Mr. Shelley that can reasonably be adopted. It must be assumed that the statutes cited give him (1) either no right to compensation under the election of November, 1882, until he received his credentials, or (2), a right to compensation back to July 20, 1882, regarding him as his own predecessor, or (3), back to May 12, regarding Smith as the "predecessor." He can only claim compensation back to July 20th, if there was a "predecessor" within the meaning of the statute. And this "predecessor" must be such either (1) *de jure*, or (2) *de facto*. The claim of Mr. Shelley is that the statute regards only the *de jure* "predecessor." If in this he is correct, then he is not entitled to compensation back even to July 20th, because Mr. Smith, the *de jure* claimant to a seat, never obtained it and could not be a predecessor. A predecessor is one who obtained a seat, not one who merely had a right to obtain it. This construction must be adopted, because the statute is to be strictly construed as against a claim to salary which is practically a demand for a gratuity unsupported by any considerations of a just right to it or by the analogy of compensation allowed by law in other official positions on similar facts, and rests only on a technical statutory right. If Smith and Shelley, occupying the relation of contestants, had both died at the same time, July 20th, 1882, and the House had taken no action on the contest, and in November some third person had been elected, he would have taken the vacancy caused by the death of Mr. Shelley—Shelley would have been the "predecessor."

The claimant is not entitled to compensation from the period from May 12, to July 20, 1882.

TREASURY DEPARTMENT,

First Comptroller's Office, December 16, 1882.

IN THE MATTER OF THE RIGHT OF THE WIDOW OF A CONTESTANT FOR A SEAT IN THE HOUSE OF REPRESENTATIVES, DECLARED ELECTED AFTER HIS DEATH, TO BE PAID THE SALARY OF THE PLACE CONTESTED.—CONTESTANT'S WIDOW'S CASE.

At the annual election in 1880, in the fourth Congressional district of Alabama, Shelley and Smith were opposing candidates for election to the place of Representative in Congress. Shelley received the "credentials" of election, and was paid the regular salary to July 20, 1882. Smith contested the election, but, pending the contest, died, May 12, 1882. July 20, 1882, the House of Representatives by resolution, declared that Shelley was not elected, and was not entitled to retain the seat, and that Smith was elected, "and, having deceased, the seat is declared vacant." The widow of Smith claimed payment, under section 49 of the Revised Statutes, of the salary to which she alleged her husband was entitled from March 4, 1881, to the date of his death.

Held:

1. The claimant is not entitled to payment.
2. Construction given to section 49 of the Revised Statutes.
3. A successful contestant for a seat in the House of Representatives, who takes the required oath and enters on his duties, is entitled to the full salary from the commencement of the Congress in which he is declared entitled to a seat, besides the proper mileage.
4. The provisions of the Revised Statutes requiring the Speaker of the House of Representatives to certify "the salary and accounts for traveling expenses" of Representatives, and making his "certificate conclusive," apply to the claim made under section 49 of the Revised Statutes by the widow of a deceased Representative.

In "Shelley's case," just preceding in this volume, most of the material facts affecting this case are stated; and some of the principles of law there stated are applicable here. At the regular annual election in 1880, in the fourth Congressional district of Alabama, Charles M. Shelley and James Q. Smith were opposing candidates for election to the place of Representative in Congress. Shelley received the "credentials" of election, took the required oath at the commencement of the session of the House in December, 1881, occupied the seat, and was paid the regular salary from March 4, 1881, to and including July 20, 1882. Smith contested the election, but died May 12, 1882, before the contest was decided. July 20, 1882, the House of Representatives, by resolution, declared that "Shelley was not elected, * * * and is not entitled to retain the seat which he now occupies," and "that James Q. Smith was duly elected, and, having deceased, the seat is declared vacant."

January 3, 1883, Hon. Hilary A. Herbert addressed a letter to the First Comptroller, saying, that "the widow of Hon. James Q. Smith" desired him "to draw her pay under" section 49 of the Revised Statutes, and has sent power of attorney, but the Sergeant-at-Arms declines to make payment, because Mr. Smith was never sworn in; and he asks the Comptroller to indicate to him an opinion for the guidance of that officer.

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

There is no law under which the claimant can be paid. This is clear from the provisions of the Revised Statutes. Section 38, in connection with the act of March 3, 1875 (18 Stat., 389), gave Shelley a right to payment of the monthly salary from the commencement of the Forty-seventh Congress, March 4, 1881, to the first day of the session of the House in December of that year, without taking any oath, and section 39 gave him a right, on taking the required oath at the commencement of the session, to payment so long as he held the seat. His right to payment has never been denied, and is unquestionable. If Smith had lived until the House declared, July 20, 1882, that Shelley was not entitled to retain the seat which he occupied, and the House had then declared Smith entitled to the seat, and he had taken the proper oath, and entered on his duties, he would have been entitled to payment of the full regular salary from the commencement of the Congress, March 4, 1881, besides mileage. This has been the uniform usage, so long continued as to have settled the construction of the statute as to salary. Section 35 of the Revised Statutes, as amended by the act of January 20, 1874 (18 Stat., 4), declares each Representative entitled to a salary of five thousand dollars a year. This is held to include successful contestants.* Hence, if Smith had thus been seated, had taken the required oath, and, before the expiration of the Congress, had died, his widow would have been entitled to the payment of the salary "from the last payment received by him to the time of his death," to be computed as the statute requires. (Rev. Stat., 49, amended by act January 20, 1874, 18 Stat., 4.) But the right of Smith himself to compensation was clearly dependent on two contingencies: (1) that he should, during his life, be declared entitled to a seat, and (2) that he should take the required oath. It cannot be known that he would have taken the oath, but, if so, he did not in fact do so, and this alone would be fatal to any right to payment to him (Rev. Stat., 39). It is difficult to perceive how his widow could be entitled to compensation when he was not. She is not entitled to payment, because Mr. Smith (1) never had the "credentials" required by law, (2) never was invested with the right or title to a seat, and (3) never did or could take the required oath. Section 49 of the Revised Statutes does say that—

"When any person who has been elected a member of or delegate in Congress dies after the commencement of the Congress to which he has been elected, his salary shall be computed and paid to his widow, or, if no widow survive him, to his heirs at law, for the period that has elapsed from the commencement of such Congress, or from the last payment received by him to the time of his death, * * *."

* In some instances appropriations have been for the full salary of successful contestants. (Act August 7, 1882, 22 Stat., 339, 340.) This was probably to meet a deficiency in the appropriation, and not because deemed necessary to give the right to the compensation.

But this provision, when read in connection with other sections, shows that the expression, "any person who has been elected," means the person who has received the "credentials," or been invested with a right to the seat of a Representative on a contest. Thus section 38 says:

"Representatives * * * elect to Congress, whose credentials in due form of law have been filed with the Clerk of the House of Representatives, * * * may receive their compensation monthly."

Hence, the "person who has been elected" is, in effect, declared to be that person whose credentials are filed. Section 49, by its own terms, indicates the same thing, by its reference to the right of the widow to payment "from the last payment received by" the sitting member. Mr. Smith did not receive any payment, and never had the right to any. He was not declared entitled to a seat, because a dead man cannot be invested with the title to an office or place as Representative. Section 39 of the Revised Statutes, referring to the rights of Representatives after the commencement of a session (see Rev. Stat., 38, for rights before commencement), says, "each member * * * after he has taken and subscribed the required oath, is entitled to receive his salary at the end of each month." Mr. Smith never took this oath, and never was in a position lawfully to do so. It would scarcely be claimed that he could be paid if he had lived, had he been declared entitled to a seat but refused to accept it and to take the required oath. When section 49 says the widow of "any person who has been elected" shall be paid, it only applies to the widow of such person as had the credentials, or was seated on a contest and took the proper oath. The widow can have no right to payment when the husband never had any.

It seems, therefore, that no relief can be afforded, unless Congress shall so provide by law. The statute, however, makes a special provision as to "the salary and accounts for traveling expenses" of Representatives in Congress, by which the Speaker of the House certifies the amounts due to each, and his certificate is made "conclusive upon all the Departments and officers of the Government." (Rev. Stat., 47, 48.) In literal terms, this provision does not apply to the claim now made, but the evident purpose of the statute was to include it. The provision is to be construed according to its intent, rather than by its mere letter. A *casus omissus* should be avoided, when any reasonable use of the words employed will permit such construction.

If the Speaker of the House of Representatives shall certify as due to the widow of Mr. Smith the salary and mileage now claimed, it will be regarded as legal evidence of the right to payment.

The Hon. Hilary A. Herbert will be advised accordingly.*

TREASURY DEPARTMENT,

First Comptroller's Office, January 5, 1883.

* This case is inserted in this volume because of its connection with the preceding case.

IN THE MATTER OF THE EFFECT OF THE TWELFTH SECTION OF THE DIRECT-TAX ACT OF JUNE 7, 1862, 12 STATUTES, 425.—DIRECT-TAX CASE.

1. The title of an act of Congress may be considered in giving construction to its provisions.
2. In view of section 11 of the Revised Statutes this is especially so as to acts providing for the payment of money on the happening of certain contingencies.
3. The act of June 7, 1862 (12 Stat., 425, sec. 12) does not contain the usual, or any apt, words, to make an appropriation, and, hence, it is reasonable to conclude that it does not do so.
4. The absence of any necessity for an appropriation is an element in giving construction to an act, the terms of which do not clearly make one.
5. An application of the rule, that "any construction that would lead to absurd consequences" should be discarded.
6. When Congress, in a statute, submits to certain States a proposition to donate money on the performance by such States, respectively, of conditions precedent therein prescribed, in view of existing conditions and policies such proposition should be accepted within a reasonable time, in order to perfect the right to such donation.
7. When a full purpose, which gives effect to its language, is found for a provision in an act of general legislation, there should not be given to it an additional effect, not required by either its language or intent, but alien to both.
8. A statute should not be construed as making a permanent specific appropriation, unless it be clear that Congress so intended.
9. The two direct-tax acts, of August 5, 1861 (12 Stat., 304, sec. 36), and June 7, 1862 (12 Stat., 425, sec. 12), are *in pari materia*, and, when considered together, show that the latter act does not make an appropriation.
10. No provision of an act designed to provide general legislation should be construed as making an appropriation, unless such purpose clearly appear.
11. Contemporaneous construction, unquestioned for twenty years, is against the claim that the act of June 7, 1862, makes an appropriation.
12. The repeal of a statute by implication only takes place when its provisions and those of a later statute cannot both stand together.
13. The question whether a statute is repealed by implication is one of legislative intent.
14. If a statute makes provision to secure a given object, and a subsequent statute provides a plenary, exclusive, and different mode of effecting the same purpose, the former statute is superseded.
15. So, a statute adopting a policy and providing means to carry it out is necessarily repealed by a subsequent statute adopting a different and hostile policy and providing the means of enforcing it.
16. Non-usage under a statute may aid the implication of its repeal.
17. The provisions of the twelfth section of the direct-tax act of June 7, 1862, declaring that certain States might, on the conditions therein prescribed, obtain a right to certain funds therein specified, were of temporary duration, and the conditions not having been accepted within the reasonable time required by this section, it ceased to be operative by its own implied limitation, and has been superseded by subsequent legislation.
18. The recognition by a statute of the existence of a power is generally equivalent to a grant of such power.
19. A legislative declaration of an exception from a power generally proves its existence.
20. No State ever complied with the conditions precedent prescribed by section 12 of the act of June 7, 1862, so as to be entitled to the benefit of its provisions.

The Secretary of the Treasury addressed a letter to the First Comptroller, as follows:

TREASURY DEPARTMENT, OFFICE OF THE SECRETARY,
Washington, D. C., December 13, 1882.

Hon. WM. LAWRENCE,
First Comptroller, &c.:

SIR: Supposing money to have been paid into the United States Treasury under the twelfth section of act, chapter xcvi, of June 7, 1862, 12 Stat. at Large, p. 422, and never to have been paid out again for the purposes, or to the State, named in that section, and several years to have elapsed since the payment into the Treasury, can it be paid out for the purposes, and to the State, named in that section (conceding that legally it should be paid), without a further appropriation by Congress directly to that end, or may it be paid from any moneys in the Treasury not otherwise appropriated? And the policy of the United States in relation to colonization of people of African descent having changed—assuming that it has changed—can money be paid lawfully for the purpose secondly mentioned in that section? Can it be taken the policy has changed?

The opinion of the First Comptroller is asked.

Very respectfully, &c.,

CHARLES J. FOLGER,
Secretary.

Hon. William Henry Trescot for the State of South Carolina:

“The Commissioner of Internal Revenue in his letter to the Secretary of the Treasury, May 3, 1880, having reported to the Secretary of the Treasury that there was paid into the Treasury a considerable sum (\$323,443.53), being ‘the proceeds of said leases and sales,’ the governor of South Carolina has applied for the two-fourths of such proceeds, setting forth that the conditions required on the suppression of the rebellion, the election of legislative and State officers who had taken an oath to support the Constitution of the United States and the President’s proclamation of the fact, had been fulfilled.

No question is made as to the existence of the fund, or its dedication by the act, but it is asked:

1. Whether the Secretary can pay out this fund by his own warrant without further legislation, or, in other words, whether section 12 of the act is an appropriation, or only the declaration of the intention to appropriate at some future time?

2. Whether the trust declared for the colonization and emigration of ‘free persons of African descent,’ has not been repealed by implication from later legislation?

First, as to the authority of the Secretary to pay on his own warrant.

Construing the acts of 1861 and 1862 together, and accepting the construction made by the Supreme Court in *The United States v. Taylor*, it would seem that these acts created the Secretary of the Treasury trustee for the purposes: 1, to pay over to the owners of taxed land the surplus of tax sales, and, 2, to pay to the governor two-fourths of the proceeds of leases and re-sales, two separate and distinct funds, for two separate beneficiaries, the administration of both of which is confided to the Secretary of the Treasury.

It would seem clear, that, if the act had enacted that ‘one-fourth of the sum of \$323,443.53, being the proceeds of the said leases and sales,

shall be paid, &c., to the governor of the said State,' &c., the duty of the Secretary would be to pay that amount to the governor upon the fulfilment of the required conditions. Now, does the fact, that the amount so appropriated is not stated, because not ascertained at the date of the act, change the duty of the Secretary, when the source of the fund is provided and its realization within the control of the Government? For the Government, under the act, had the discretion to lease or sell. If it had sold nothing, but had leased all the land, would an annual specific appropriation of the annual proceeds of the leases have been necessary to justify the Secretary in paying over the two-fourths to the governor?

If, therefore, in case the land had all been sold at once, or, in case the land had all been leased, no further specific appropriation would have been needed, does such appropriation become necessary when the fund has been gradually realized and finally settled?

What is a legal appropriation? Is it not the legislative authority to the Secretary of the Treasury to pay to certain persons, for special purposes, a specific fund in the Treasury?

Is not section 12 of the act of 1862 a legislative authority to the Secretary of the Treasury to pay to the governor of South Carolina, for purposes especially declared in the act, two-fourths of the proceeds of leases and sales paid into the Treasury?

Does the fact that the amount could not be paid until the sales were made vitiate the specific character of the fund? Is it any less specific than an appropriation to be paid out of any funds in the Treasury not otherwise appropriated? Is not this appropriation of precisely the same character as that by which the tax commissioners were authorized under the direction and control of the Secretary of the Treasury to set apart certain other lands, and to apply the rents and issues thereof to the education of colored youth and poor white persons? And yet it has never been held that a further specific appropriation was needed to warrant this use of the fund.

It would seem that all the conditions of an appropriation are present. It is authorized by law, section 12, act 1862—authority is given to the proper person, the Secretary of the Treasury—it is to be paid to a special person, the governor of South Carolina. Its purposes are distinctly declared, and the specific fund is in the Treasury.

Second, as to the repeal of that portion of section 12, which dedicates one-fourth of the fund to the colonization or emigration of 'free persons of African descent.'

No direct repeal of this law has ever been enacted, or, as far as is known, ever been suggested. The idea seems to be that this provision applied only when, to use a common but inaccurate phrase, the negro was the ward of the Government, and that since he has become a full citizen, he does not need and ought not to receive this help.

But the negro still fills the description of the beneficiary of this trust, he is still a 'free person of African descent,' the only difference being that at the date of the act he was only emancipated, he is now both emancipated and enfranchised. It is impossible to find in the added enfranchisement anything which implies a repeal, nor is there anything in the history of legislation since the date of the act to show that the Government would refuse the aid to emigration which this section provides.

The trust has been declared, and it has been accepted. For when the governor applies for this fund, he asks for it, necessarily, subject to the conditions of the act, and in so doing accepts the conditions. He

could not have made the application until he knew that such fund existed, and it is only within a very reasonable time before the application that the existence of the fund and its amount was publicly declared by the Commissioner of Internal Revenue.

In closing this memorandum, it ought to be noticed, that the governor of South Carolina is not an adverse claimant, he is a beneficiary, asking only that which the Government of its own free will has given him, and he is entitled to expect that the acts creating the trust will be so interpreted as to secure to him with the least obstruction and the least delay, the benefits which the United States have voluntarily conferred upon him."

OPINION BY WILLIAM LAWRENCE, *First Comptroller* :

The act of Congress approved June 7, 1862 (12 Stat., 422), entitled "An Act for the Collection of direct Taxes in Insurrectionary Districts within the United States, and for other Purposes," in connection with a prior act, authorized the assessment of taxes on lands in any State, or portion thereof, in which civil war existed, and provided for the sale of lands for the non-payment of such taxes, for the purchase thereof by the United States in certain cases, and for the leasing and resale of lands so purchased. It then provides, as follows :

SEC. 12. *And be it further enacted*, That the proceeds of said leases and sales shall be paid into the Treasury of the United States, one-fourth of which shall be paid over to the governor of said State wherein said lands are situated, or his authorized agent, when such insurrection shall be put down, and the people shall elect a legislature and State officers who shall take an oath to support the Constitution of the United States, and such fact shall be proclaimed by the President for the purpose of reimbursing the loyal citizens of said State, or such other purpose as said State may direct; and one-fourth shall also be paid over to said State as a fund to aid in the colonization or emigration from said State of any free person of African descent who may desire to remove therefrom to Hayti, Liberia, or any other tropical state or colony. *

* See Senate Ex. Doc., No. 24, first session, Forty-sixth Congress, for much valuable information, as to the direct-tax acts and proceedings under them. See, also, the reports of the Commissioner of Internal Revenue.

The following letter shows receipts from resales and leases in South Carolina :

TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
Washington, January 2, 1883.

HON. WILLIAM LAWRENCE,
Comptroller of the Treasury :

SIR: In compliance with your request, I submit the following statement of receipts from resales and leases in South Carolina, to which section 12, act of June 7, 1862, refers, viz:

Received from Army and Navy sales	\$144,460 76
Received from head of family sales	33,375 46
Received from sales to loyal citizens	41,768 00
Received from rentals or leases	43,745 12
Total	263,349 34

Section 12 of act of Congress approved June 7, 1862, refers to section 11 of the same act, and covers sales made to soldiers and sailors, to heads of families, and to

This act has been regarded as one not "permanent" in its nature, and, hence, no part of it is incorporated in the Revised Statutes (Rev. Stat., 5595). It is to be construed, therefore, as an independent statute; but with the aid of its history and that of legislation generally it is entirely clear that its section 12 does not make an appropriation of any money, nor, in other words, does it, without the aid of a separate appropriation act, authorize any money to be paid to any State, or to the governor of any. This must appear from the following considerations:

I. The title of an act may properly be considered in giving construction to its provisions. (Bishop, *Written Laws*, 44–51, 82). There is nothing in the title of this act to indicate a purpose to make an appropriation.

This is by no means conclusive on the question of an appropriation, but it is one element, which, in connection with others, is entitled to some consideration. This is especially so in view of the act of August 26, 1842 (5 Stat., 536), carried into the Revised Statutes, section 11, which provides that:

"The style and title of all acts making appropriations for the support of Government shall be as follows: 'An act making appropriations (here insert the object) for the year ending June 30 (here insert the calendar year).'"

II. In the act of June 7, 1862, there are no apt words, nor those usually employed, to make an appropriation.

Of course it is possible to make an appropriation without using the words "appropriated," &c., but the absence of "appropriated," or apt words to make an appropriation, is an element which should not be overlooked. The usual words are: "That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated."

When the words used are not those usually employed in appropriation acts, but are, as in this case, a wide departure therefrom, it must be

loyal citizens, also proceeds from leases. I have, therefore, included in this statement only such items as come under these headings.

Respectfully,

H. C. ROGERS,
Acting Commissioner.

On the same subject, see also MSS. letter of Hon. Columbus Delano, Commissioner of Internal Revenue, to Hon. George S. Boutwell, Secretary of the Treasury, dated February 11, 1870. A copy of this was filed in the office of the First Comptroller, January 2, 1883. This letter says \$192,842.58 has been [at that date] received under sections 9 and 11 of the act of June 7, 1862, but that section 6, of the act of March 3, 1865, provides for the payment of expenses, which then amounted to about \$52,535.14. The expenses prior to March 3, 1865, were paid by Treasury warrants, and the letter suggests the inquiry as to reimbursing the United States from proceeds of sales.

And see Senate Ex. Doc., No. 85, Forty-seventh Congress second session, being "Letter from the Secretary of the Treasury, transmitting, in response to Senate resolution of April 14, 1882, a tabular statement exhibiting the number of farms or plantations sold in the States of Virginia, Florida, Arkansas, and Tennessee, under an act for the collection of direct taxes in insurrectionary districts within the United States."

inferred that the difference had a purpose. Thus, it is said, "If * * * a statute employs terms or modes of expression which had acquired a definite signification in previous enactments on the same or some analogous subject, the established interpretation will, in the absence of any special indication to the contrary, prevail." (Bishop, *Written Laws*, 97.)

And it is said, that, "Where language is changed in a special enactment not part of a revision, [from that usually employed to secure a definite result,] it indicates a change of intent, and calls for a change of construction." (Sedgwick, *Construction Stat. and Const. L.*, 2d ed., 229, note; *Rich v. Keyser*, 54 Pa. St., 86; Bishop, *Written Laws*, 82, 99.)

There is another departure from the usual language of appropriation acts.

The expression, "not otherwise appropriated," may be unnecessary, since a general appropriation could scarcely be construed as authorizing the use of a specific fund already expressly appropriated for a given object. In this view, the expression is only used to exclude a conclusion which otherwise might result in the repeal of a previous appropriation act. The omission to use the ordinary form of expression for an appropriation in the particular act referred to is certainly an additional, though it may not necessarily be a conclusive, element in determining that no appropriation is made.

III. The absence of any necessity for an appropriation is also an element in determining that none is made.

The proper construction of a statute may sometimes be determined by the reason or necessity which led to its enactment. And there is a well-known rule, that construction "should lean strongly to avoid absurd consequences." (Bishop, *Written Laws*, 82, 90, 93, 200; *Oates v. National Bank*, 100 U. S., 244.)

In view of these principles of law, there are several considerations which indicate that no appropriation was intended.

1. There was no necessity for an appropriation at the date of the act of June 7, 1862, and no reasonable prospect that any would be required in the near future. The civil war was flagrant in eleven States. Before an appropriation could become necessary, several conditions precedent were required: "when [1] such insurrection shall be put down, and [2] the people shall elect a Legislature and State officers, [3] who shall take an oath to support the Constitution of the United States, and [4] such fact shall be proclaimed by the President." It was by no means certain that these conditions would ever exist, and if they should thereafter exist, the necessarily long continued sessions of Congress afforded ample means to make the needed appropriation.

2. If the twelfth section of the direct-tax act of June 7, 1862, carries with it two appropriations of two several one-fourth parts of "the proceeds of * * * leases and sales," they must be paid either (1) out

of such proceeds as a specific fund, or (2) out of any other money in the Treasury not otherwise appropriated.

(1.) If the ordinary meaning of its terms is to control, then the appropriation, if one is made, is out of the proceeds of leases and sales. The language is, "That the proceeds of said leases and sales shall be paid into the Treasury, * * * one-fourth of which shall be paid over to the governor of said State wherein said lands are situated," &c.

On the theory that this is an appropriation, it would require that specific fund ("proceeds of * * * leases and sales") to be held in the Treasury to await the happening of the uncertain future conditional contingencies mentioned in the statute. This result follows from the rule, that the words of the statute are to be construed "in their ordinary grammatical sense, unless such a construction would be obviously repugnant to the intention of the framers of the instrument, or would lead to some other inconvenience or absurdity." (Sedgwick, *Construction Stat. and Const. L.*, 2d ed., 220.)

It seems improbable that an actual appropriation would be made, which would, for an unknown period, set apart money in the Treasury for a purpose, perhaps never requiring it, and prevent its use for other purposes demanding every dollar which could be made available to meet expenses in a period of war. (*Veazie Bank v. Fenno*, 8 Wall., 536.)

(2.) If it be said the appropriation is not of the specific money received from leases and sales, but out of any money which may be in the Treasury not otherwise appropriated, this will bring about a result not justified by any words used, and without the usual language employed for that purpose. But even if this could be so, it cannot justify a construction which would create an operative appropriation. If there be an absolute appropriation, it is neither an "annual" nor a "permanent annual," but a "permanent specific" appropriation. (*Wood's Case*, 1 Lawrence, Compt. Dec., 2; *Police Case*, *Id.*, 57; *Canal Case*, *Id.*, 141; *Arsenal Case*, *Id.*, 147; *Id.*, App., ch. xiv, 579, 580.) It seems improbable, if not absurd, to suppose that Congress, in advance of any necessity for it, and with a knowledge that conditions might change rendering it inexpedient or unnecessary, would, nevertheless, make such an appropriation.

(3.) The twelfth section of the act of June 7, 1862, may be regarded as an inducement held out to the people of the insurrectionary States to return to allegiance. It was enacted at a time when the Government was pursuing the policy of "saving the Union with slavery." (President's Proclamation, May 19, 1862, 12 Stat., 1264.) The offer was made in view of that policy.

But, on plain principles of reason and law, an offer must be accepted within a reasonable time, and, if it is not, it may be withdrawn without breach of faith, and without incurring liability thereon, especially when new conditions have arisen, and a new policy is adopted. (*Kendall v. United States*, 1 Ct. Cl., 261; s. c., 2 Ct. Cl., 592.) This is

the rule in offers to make contracts. Thus, it is said: "Propositions or offers on time involve questions of the assent of parties, which are sometimes difficult. * * *. How long will it continue? The only answer must be, in general a reasonable time; and what this is must be determined by the circumstance of the case." (1 Parsons, Contracts, 6th ed., 480, 481, citing *Beckwith v. Cheever*, 1 Foster, N. H., 41; *Peru v. Turner*, 1 Fairf., Maine, 185; See *Cooley, Const. Lim.*, 4th ed., 284.)

As a question of constitutional law, Congress may repeal an act making such offer at any time before acceptance. (*Cooley, Const. Lim.*, 4th ed., 284; *Rector, &c., Christ Church, Phila., v. Co. of Phila.*, 24 How., 300; *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich., 259; s. c., 13 Wall., 373; *People v. State Auditors*, 9 Mich., 327; *Montgomery v. Kasson*, 16 Cal., 189; *Adams v. Palmer*, 51 Maine, 480.)

IV. A sufficient purpose is found for section 12 of the act of June 7, 1862, and full effect can be given to all its provisions, without regarding it as making an appropriation.

1. It was an invitation to the several States, in which civil war existed, to abandon it, and to elect a legislature and State officers acting under the authority of the Constitution. It was a proposition to aid such government in each State in reimbursing the loyal citizens thereof their losses by war, and, as the statute says, "to aid in the colonization or emigration from said State of any free person of African descent who may desire to remove therefrom to Hayti, Liberia, or any other tropical state or colony." It was based on the idea of the perpetuation of slavery, and, hence, only proposed to aid the emigration of free persons. This proposition, submitted by Congress to the States in rebellion, required speedy consideration, action, and legislation. It is unreasonable to suppose that it was intended to be a proposition to continue indefinitely. Until accepted no appropriation was necessary. If not accepted within some reasonable period, the proposition was not, in justice, law, or morals, for any further or longer period, obligatory on Congress, nor to be regarded as open for acceptance. When the proposition was itself terminable, by non-acceptance within a reasonable time, it would certainly seem absurd to give to the statute a construction which would make a permanent specific appropriation operating after the offer to pay had terminated, and when no right to payment, based on performance of conditions precedent, could exist. When a sufficient purpose, which gives effect to its language, is thus found for this section, there should not be given to it an additional effect, not required by either its language or intent, but alien to both.

2. There is still another reason in this connection against the construction which favors an appropriation. A rule of the Senate, in force since September 14, 1837, declares, that "no appropriation shall be reported in general appropriation bills, or be in order as an amendment thereto, for any expenditure not previously authorized by law." The

rule of the House, adopted in 1850, is much to the same effect. (Bundy's Case, 1 Lawrence, Compt. Dec., 185.)

It may well be supposed, for reasons already stated, that section 12 of the act of June 7, 1862, was incorporated as general legislation, and as the authority on which an appropriation might thereafter be made, if found necessary.

V. The act of June 7, 1862, does not make an appropriation, when construed by the rule applicable to acts making permanent specific appropriations. A statute should not be construed as making such an appropriation, unless it is clear that Congress so intended; and a statute making such an appropriation is to be strictly construed. This is the rule of reason, and has been uniformly adopted. (Canal Case, 1 Lawrence, Compt. Dec., 141.) It cannot be supposed that Congress intended to make a permanent appropriation, implying a pledge that it should run for an indefinite period without legislative supervision, and contrary to the general rule of making annual appropriations, unless such purpose is expressed in clear language.

VI. The two direct-tax acts of August 5, 1861 (12 Stat., 304, sec. 36), and June 7, 1862 (12 Stat., 425, sec. 12), when considered together, show that no appropriation was made by the latter act. The Supreme Court held, in *Bennett v. Hunter* (9 Wall., 326), that these two acts were *pari materia*, and "to be construed together." (*United States v. Taylor*, 104 U. S., 219.) Section 36 of the former act provides, as to the proceeds of tax sales of the whole of any tract of land, that:

"The surplus of the proceeds of the sale, after satisfying the tax, costs, charges, and commissions, shall be paid to the owner of the property, or his legal representatives, or if he or they cannot be found, or refuse to receive the same, then such surplus shall be deposited in the Treasury of the United States, to be there held for the use of the owner or his legal representatives, until he or they shall make application therefor to the Secretary of the Treasury, who, upon such application, shall, by warrant on the Treasury, cause the same to be paid to the applicant."*

* That provision of the act of August 5, 1861 (12 Stat., 304, sec. 36), which authorizes, that "the surplus of the proceeds of the sale [for direct taxes], after satisfying the tax, * * * shall be paid to the owner of the property," without a technical appropriation act, and without being first covered into the Treasury, is somewhat anomalous. There have been other similar statutes. (Act June 30, 1864, 13 Stat., 239; direct-tax act March 3, 1865, 13 Stat., 502, sec. 6, 1 Lawrence, Compt. Dec., App., ch. XII, 535; Bundy's case, *Id.*, 184; District-Land-Office Case, 2 *Id.*, 416; Indian-Land Case, 2 *Id.*, 369; Rev. Stat., 2748; Act April 20, 1866, 14 Stat., 40, sec. 2; Deficiency Appropriation act August 5, 1882, 22 Stat., 267; Osage Land Case, *post.*)

Under the act of July 16, 1866 (14 Stat., 175), and the instructions of the President therein referred to, certain "school farms" were authorized to be sold, and it was provided, that "the proceeds of said sales, after paying expenses of the surveys and sales, shall be invested in United States bonds, the interest of which shall be appropriated, under the direction of the Commissioner, to the support of schools, without distinction of color or race, on the [islands] in the [parishes] of Saint Helena and Saint Luke."

This act of August 5, 1861, does not in terms specifically make an appropriation, but it explicitly directs payment to be made "by warrant on the Treasury." This gave the claimant a right of action. (*United States v. Taylor*, 104 U. S., 216.) And it may be that, by inference, it makes an appropriation. But, if so, it does not follow that the act of June 7, 1862, makes an appropriation, because there is in this act no provision for a warrant for payment. The absence of such provision in the act of June 7, 1862, reasonably raises an inference against the existence of an appropriation or an authority to make payment to any State. The eighth section of the act of July 16, 1866 (14 Stat., 175), in relation to the proceeds of sales of "school farms," is of like character with the act of August 5, 1861. It specifically declares, that "the proceeds of said sales, * * *, shall be invested in United States bonds, the interest of which shall be appropriated, under the direction of the Commissioner, to the support of schools." This money never came into the Treasury, but was expressly appropriated, and the proper officer was designated to expend it without any delay, and without the performance of any conditions precedent by the beneficiaries.

VII. The act of June 7, 1862, provides general legislation, and, therefore, should not be construed as making an appropriation, without clear words for that purpose; which it does not contain.

Legislative provisions found in an annual appropriation act will generally be construed as applicable only to the appropriations therein made, if their language may reasonably be so limited. Such provisions will not generally be construed to be permanent legislation, unless that purpose appears with reasonable clearness (*Minis v. United States*, 15 Pet., 445; *Artificial-Limbs Case*, 2 Lawrence, Compt. Dec., 397). Upon the same or analogous principles, a clause in an act providing general legislation will not be construed as making an appropriation, unless such purpose be clear. The reasons for this are stronger than the reasons for the rule as to general legislation on appropriation acts. It is much more usual to engraft general legislation on appropriation acts, than appropriation provisions on acts providing general permanent legislation.

VIII. Contemporaneous construction, long continued, and undisputed for twenty years, is against the claim that the act of June 7, 1862, makes an appropriation. No money has ever been carried to the credit of any State under this act on the books of the Treasury Department. No claim has ever, until recently, been made on behalf of any State. The money covered by the section of the act under consideration has been applied to other purposes. The President treated the act as having been repudiated by the States.*

* Section 11 of the act of June 7, 1862, required sales to be made by the commissioners "under the direction of the President." His "directions" are dated September 16, 1863 (Senate Ex. Doc. No. 24, 1st sess., 46th Congress, 223), and apply only to South Carolina. The act was originally designed to apply to all the States in which tax sales were made.

IX. The provisions of the twelfth section of the act of June 7, 1862, proposing payment to States, (1) have been superseded or have become obsolete, (2) were never accepted by any State, and (3) were temporary in their character, and have ceased to be in force by their own limitation.

1. The first branch of this proposition is supported by several considerations:

(1). The doctrine is fully recognized, that repeals by implication are not favored, and that the conflict, by which a subsequent statute works the repeal of a former one by implication, must be such that both cannot stand together. (*McCool v. Smith*, 1 Black, 459; *United States v. Taylor*, 104 U. S., 218.) The question of repeal by implication is one of legislative intent. If a statute makes provision to secure a given object, and a subsequent statute provides a plenary, exclusive, and different mode of effecting the same purpose, both modes cannot be adopted, and the former statute is superseded or repealed by implication. So, a statute making provision to effect a specified policy is necessarily superseded by a subsequent statute designed to secure a different and hostile policy, since it is absurd to suppose that Congress could, in such case, intend that both should stand.

(2). The fact that Congress has never made an appropriation in favor of any State to execute the twelfth section of the act of June 7, 1862, and that no demand has been made for any, is a contemporaneous and continuous assertion of the repeal, or that the provisions referred to are obsolete, or that no right was ever acquired under them. There is a maxim "*Contemporanea expositio est optima et fortissima in lege.*" (Bishop, *Written Laws*, 104, 149; Sedgwick, *Construction Stat. and Const. L.*, 2d ed., 227, *note*; Potter's *Dwarris, Stats. and Consts.*, 184; *Stuart v. Laird*, 1 Cranch, 299; *Chestnut v. Shane's Lessee*, 16 Ohio, 599; *Hill v. Smith*, Morris, 76; *Watson v. Blaylock*, 2 Mill, s. c., Const., 351; *Canady v. George*, 6 Rich., s. c., Eq., 106; *O'Hanlon v. Myers*, 10 Rich., 128; *Swift Co. v. United States*, 105 U. S., 695.)

Non-usage under a statute may help the implication of its repeal by inconsistent provisions in a subsequent act. (Bishop, *Written Laws*, 149, citing *Leigh v. Kent*, 3 Term R., 362, 364.)

(3). Congress has totally changed the policy contemplated by the section of the act under consideration, and has superseded and recognized it as obsolete. The act of June 7, 1862, proposed, on conditions, to provide a fund "for the purpose of reimbursing the loyal citizens" of the insurrectionary States, "or such other purpose" as any of said States might direct, and "a fund to aid in the colonization or emigra-

The Acting Commissioner of Internal Revenue, in a letter, January 4, 1883, to the First Comptroller, says:

* * * South Carolina is the only State in which lands sold and struck off to the United States for direct taxes were subdivided and resold or leased as provided in section 11, act of Congress approved June 7, 1862, and it is the only State to which the provisions of section 12 of the above-mentioned act can in any manner apply.

tion * * * of any free person of African descent" who might desire to remove from any such State.

a. Congress has made provision by general statutes for reimbursing loyal citizens, and has supplemented all these statutes by many private relief acts.* It is to be presumed that Congress has thus made all the provision deemed necessary, or that future provision will be made to perfect the same general policy.

b. The colonization of "free person [s] of African descent" contemplated the continued existence of slavery; but this policy was changed by the Proclamation of Emancipation of September 22, 1862 (12 Stat., 1267), and January 1, 1863 (12 Stat., 1268), and by the XIII Article of Amendment to the Constitution, which took effect December 18, 1865. These were followed by the XIV and XV Articles of Amendment to the Constitution, and by laws to enforce and secure equal civil and political rights. (Rev. Stat., 1977-2038.) In view of all this, it cannot be supposed that Congress intended that the provisions of section 12 of the act of June 7, 1862, now under consideration, should be regarded as in force. It is well settled, that, when Congress by a statute recognizes the existence of a power, although it has not been in terms previously conferred, this is generally equivalent to a grant of such power (Otto's Case, *ante*, 296; *State v. Miller*, 23 Wis., 634; 15 Op. Att.-Gen., 322; Const. U. S., Art. I, sec. 9; Story, Const., § 1331; *Holden v. Joy*, 17 Wall., 234.)

A legislative declaration of an exception from a power generally proves its existence. (*Gibbons v. Ogden*, 9 Wheat., 216.) Upon the same principle, the adoption of constitutional amendments, and the enactment of statutes which make plenary provision for "reimbursing * * * loyal citizens," and which totally change the policy of aiding "the colonization or emigration * * * of any free person of African descent," must be regarded as superseding, and so repealing, all former provisions on the subject.

2. No State performed the conditions, which would have conferred a right to either of the payments proposed by section 12 of the act of June 7, 1862, nor secured the proclamation required by said section. This is only material as affecting the question of good faith involved, in a refusal by Congress to make appropriations under the act of June 7, 1862. The effect of a refusal is the same whether justifiable or not. But if justifiable, this will tend to strengthen the construction, which has been given, of all the legislation to which reference has been made. It has been shown that on principle, the States were bound to accept the provisions of the act of June 7, 1862, within a reasonable time, or

* See "The Law of Claims against Governments," &c., by William Lawrence [Congress], House Rep., No. 134, 2d session, 43d Congress; act of March 3, 1871, 16 Stat., 524, providing for the "Commissioners of Claims"; act May 11, 1872, 17 Stat., 97; act March 3, 1873, 17 Stat., 577.

failing in this, Congress might in good faith supersede them. War was then flagrant, and Congress could not afford to make a pledge which for any considerable period would prevent a change of policy. Such change might be required by that highest law, *Salus populi suprema est lex*.

The proclamation of emancipation may furnish some evidence on the question of time. Its period prescribed for a change of policy was from September 22, 1862, to January 1, 1863—one hundred days. This was sanctioned by constitutional amendments and acts of Congress. The act of June 7, 1862, required that the “insurrection shall be put down, and the people shall elect a legislature and State officers, who shall take an oath to support the Constitution of the United States, and such fact shall be proclaimed by the President.” This is to be read in the light of history. Efforts had been made in some States by “the people,” of their own voluntary action, to set up or organize loyal State governments, but these were ineffectual. And no efforts for this purpose were made under the act of June 7, 1862, nor within any reasonable time thereafter. Attempts were made, after flagrant war ceased, to continue in operation the State governments existing during the war, but these were set aside by military authority.* The close of flagrant war, in 1865, found the State of Tennessee with a *quasi* voluntary loyal State government organized by the aid of national military authority. The act of June 7, 1862, required, as a condition precedent to the right of any State to payment under it, that the President should issue a proclamation of the existence of the facts therein required. The President’s Proclamation as to Tennessee of June 13, 1865 (13 Stat., 763), was the first on the subject, and others followed at a later date.† But

* May 3, 1865, Governor Joseph E. Brown issued a proclamation calling a meeting of the legislature May 22. This was annulled by military order of Major-General Gilmore, and by ordering a convention.

May 8, 1865, Governor McGrath, of South Carolina, summoned the State officers to Columbia to resume their duties, but this was annulled May 14, by military order of Major-General Gilmore.

Provisional governors were appointed in these and other States by the President.

May 9, 1865, the President, by proclamation, recognized the State government of which Pierpont was Governor, which may have, in some sense, represented a government organized by the people.

But all these governments, except that of Tennessee, were superseded by the reconstruction acts. See McPherson’s History of Reconstruction, *passim*; Lawrence’s Speech as to Virginia in House Reps., January 13, 1870, 2d Sess. 41st Cong., vol. 88, Globe, Part 1, p. 431.

† See schedule of these in Lawrence’s Law of Claims against Governments, 208. The history of the reconstruction of the States declared in insurrection may be found in McPherson’s History of Reconstruction; in the History of the Reconstruction Measures of the Thirty-ninth and Fortieth Congresses, 1865–’68, by Henry Wilson, Hartford, 1868;” in the debates and legislation of Congress, and in other current history. See speech in House Reps. as to Georgia, December 22, 1869, 2d Sess., 41st Cong., Globe, vol. 94, Part 7, App., p. 34, and as to Mississippi, March 31, 1869, 1st Sess. 41st Cong., Globe, vol. 87, App., 5.

none of these pretended to assert a compliance by any State with the twelfth section of the act of June 7, 1862. The proclamation as to Tennessee expressly reserved the right to exercise "military law in cases where it shall be necessary for the general public safety." The act of June 7, 1862, refers to a time "when such insurrection shall be put down." It required a loyal State government in operation. This contemplated an end to the war, not merely an end to "flagrant war," but also an end to that "state of war," which the Tennessee proclamation recognized, and which was affirmed, in effect, to exist in this and other States, during the period of military reconstruction attempted by President Johnson (proclamation of July 13, 1865, 13 Stat., 771), and, after this, during the "reconstruction acts." This "state of war" has been described as "*non flagrante bello, sed nondum cessante bello*." (Lawrence's Law of Claims, 209; Mrs. Alexander's Cotton, 2 Wall., 419.) The act of June 7, 1862, evidently contemplated the election of a "legislature and State officers" in each of the States therein referred to, either under the laws of the respective States, or by their voluntary action. But voluntary reorganization, except to a certain extent in Tennessee, was not effected. President Johnson attempted a reconstruction as his "policy," (proclamation May 29, 1865, 13 Stat., 760), without the authority of any statute, but this did not look to voluntary State action. It contemplated executive military control by the President. The proclamation of April 2, 1866 (14 Stat., 811), did not declare the facts required by the act of June 7, 1862. But if it had done so, this and the prior proclamation of May 29, 1865, were disapproved by Congress (act July 19, 1867, 15 Stat., 14), and provision was made by that body for the reorganization of State governments in all the insurrectionary States, except Tennessee. See the "reconstruction acts" of March 2, 1867 (14 Stat., 428), March 23, 1867 (15 Stat., 2), and July 19, 1867 (15 Stat., 14); joint resolutions of July 20, 1868 (15 Stat., 257), and February 18, 1869 (15 Stat., 344); act of April 10, 1869 (16 Stat., 41); proclamations of May 14, 1869 (16 Stat., 1125), July 13, 1869 (16 Stat., 1127), and July 15, 1869 (16 Stat., 1129), and act of December 22, 1869 (16 Stat., 59.) In Tennessee a State government was organized under the direction of a military governor, a civil governor was elected March 4, 1865, and the State was restored to its relations to the Union, prior to the "reconstruction acts," by the joint resolution of Congress of July 24, 1866 (14 Stat., 364). The reconstruction thus effected, as to the States mentioned, evidently did not secure the "election of a legislature and State officers," as contemplated by the act of June 7, 1862. This act looked to no such agencies as those employed by the "reconstruction acts," nor to the delay which intervened before they were adopted. This reconstruction, thus finally effected and accepted by Congress, was that required by the "reconstruction acts," executed and made effectual by military authority. No proclamation

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was issued by the President under, or looking to, the twelfth section of the act of June 7, 1862.*

3. Finally, the twelfth section of the act of June 7, 1862, was, in its nature and object, and from the necessities of the war, designed to be temporary, and, not having been accepted by the States within the reasonable time evidently required, expired by its own limitation, before the war closed. This sufficiently appears from the considerations already presented. It follows, that no State has any right to payment under the twelfth section of the direct-tax act of June 7, 1862.

The Secretary of the Treasury will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 24, 1882.

IN THE MATTER OF THE APPOINTMENT OF A SUBSTITUTE TO PERFORM THE DUTIES OF CLERK IN THE TREASURY DEPARTMENT, WITH A RIGHT TO RECEIVE PART OF THE CLERK'S SALARY.—SUBSTITUTE CASE.

1. There is no authority of law, by which a substitute can be appointed to perform the duties, and, by reason thereof, receive any part of the salary, of a clerk in the Treasury Department.
2. Such substitution is unauthorized, is against public policy, and is prohibited by statute.
3. The principles stated apply also, as to substitutes for messengers, assistant messengers, copyists, watchmen, laborers, and other employés in the Department.
4. The head of a Department may, at his pleasure, accept the resignation of, or remove, a clerk, and restore him to office, and, in the mean time, appoint another person to the vacant place, with a right to the whole salary prescribed by law.
5. He may do the same with unofficial employés.
6. A statute may authorize contracts for services, and give authority for the employment and payment of persons in such mode as it may prescribe.

September 10, 1882, a clerk in the Treasury Department addressed a letter to the Secretary, requesting "an extension of leave of absence of fifteen days * * * from September 17th, with permission to employ a substitute for that time; the person employed and the rate of compensation to be named by the Secretary." In other words, the application is, that the clerk be permitted to retain her office, remain absent

* States were admitted to representation under the reconstruction acts as follows:

1. Arkansas, act June 22, 1868, 15 Stat., 72; 2. North Carolina, act June 25, 1868, 15 Stat., 73; 3. South Carolina, act June 25, 1868, 15 Stat., 73; 4. Louisiana, act June 25, 1868, 15 Stat., 73; 5. Georgia, act June 25, 1868, 15 Stat., 73; 6. Alabama, act June 25, 1868, 15 Stat., 73; 7. Florida, act June 25, 1868, 15 Stat., 73; 8. Virginia, act January 26, 1870, 16 Stat., 63; 9. Mississippi, act February 23, 1870, 16 Stat., 67; 10. Texas, act March 30, 1870, 16 Stat., 80; act May 4, 1870, 16 Stat., 96.

As to the time when the rebellion was suppressed, see *United States v. Anderson*, 9 Wall., 56; *Erwin v. United States*, 97 U. S., 393; *Lawrence's Law of Claims against Governments*, House Rep., No. 134, 2d sess., 43d Congress, 209.

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for a time, receive the full salary, and pay a portion of it to a substitute selected to perform the duties of the clerk during such absence. In this way the voucher for payment would be signed by the clerk, and this only would be presented to the accounting officers for settlement.

September 15, 1882, this letter was referred by the Assistant Secretary of the Treasury to the First Comptroller "for his opinion as to whether the Department can authorize the request."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

Services are rendered in the Treasury Department either by officers, "messengers, assistant messengers, copyists, watchmen, laborers, and other employés" (Rev. Stat., 169), or, in some cases, by contractors. The officers are "appointed by the President, by and with the advice and consent of the Senate" (Rev. Stat., 234, 268, 276), or by the Secretary of the Treasury, and the messengers and other employés by the latter authority. (Rev. Stat., 169.)

It is very clear that a substitute cannot be lawfully appointed, or authorized, to perform the duties of an officer.

1. It is a sufficient objection to such appointment, or service, that there is no statute, or rule of common law, which authorizes either.

2. The Constitution of the United States requires that "all executive and judicial Officers * * * shall be bound by Oath or Affirmation, to support this Constitution." (Art. VI, 3.)

The statute has added to the requirement of the Constitution, by declaring, that "every person * * * appointed to any office * * * shall, before entering upon the duties of such office, and before being entitled to any part of the salary or other emoluments thereof, take and subscribe" an oath or affirmation in these words:

"I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion, and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." (Rev. Stat., 1756, 1757, 1758.)

There is no authority for a substitute to take this oath. It can only be taken by the "person elected or appointed to any office." (Rev. Stat., 1756.) A substitute cannot be appointed, as such, to an office held by another person, because there is no vacancy. The number of clerks is limited by law. A failure to perform the duties of an office, at least for a limited period, does not *per se* vacate the office. An office is only vacated by death, resignation, removal, the acceptance of an incompatible office, judicial ouster, and, perhaps, by long abandonment.

3. The Constitution and the statute, by requiring an oath of office to precede the performance of any official duty, necessarily exclude the

right of any unofficial person to perform duties prescribed by statute for officers.

4. It is well settled by the common law also that the authority to render official services cannot be delegated. Thus, it is said: "The person to whom any office or duty is delegated—for example, an arbitrator, cannot lawfully devolve the duty on another, unless he be expressly authorized so to do." (Broom, Legal Maxims, 840.) The maxim applies—"*delegata potestas non potest delegari*."

5. The arrangement for a substitute, as requested in this case, is against public policy. The danger of substituting unskillful service for that resulting from official experience, the peril of permitting service without the sanction of an oath to perform it faithfully, the encouragement it would give to official absenteeism and favoritism, and the injustice of permitting an officer performing no service to receive compensation for the service of a substitute, must all be manifest. If the duties of an officer—a clerk being an officer—in one position, may be delegated, upon the same principle, those of any other officer in any other position may be. It will not be pretended that the head of a Department or Bureau can, without specific statutory authority, substitute an unofficial person to perform his duties. If unofficial persons may be placed in charge of official duties, they will not be amenable to the statutory provisions, which punish official delinquency, and this safeguard will be taken from the public. (Rev. Stat., 5481–5505.)

6. The employment of substitutes is prohibited by the fourth section of the legislative, executive, and judicial appropriation act of August 5, 1882 (22 Stat., 255), as follows:

SEC. 4. That no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall after the first day of October next be employed in any of the executive departments, or subordinate bureaus or offices thereof at the seat of government, *except only at such rates and in such numbers, respectively, as may be specifically appropriated for by Congress for such clerical and other personal services for each fiscal year; and no civil officer, clerk, draughtsman, copyist, messenger, assistant messenger, mechanic, watchman, laborer, or other employee shall hereafter be employed at the seat of government in any executive department or subordinate bureau or office thereof or be paid from any appropriation made for contingent expenses, or for any specific or general purpose, unless such employment is authorized and payment therefor specifically provided in the law granting the appropriation, and then only for services actually rendered in connection with and for the purposes of the appropriation from which payment is made, and at the rate of compensation usual and proper for such services*, and after the first day of October next, section one hundred and seventy-two of the Revised Statutes, and all other laws and parts of laws inconsistent with the provisions of this act, and all laws and parts of laws authorizing the employment of officers, clerks, draughtsmen, copyists, messengers, assistant messengers, mechanics, watchmen, laborers, or other employees *at a different rate of pay or in excess of the numbers authorized* by appropriations made by Congress, be, and they are hereby, repealed; and thereafter all details of civil officers, clerks, or other subordinate employees from places outside of the District of

Columbia for duty within the District of Columbia, except temporary details for duty connected with their respective offices, be, and are hereby, prohibited; and thereafter all moneys accruing from lapsed salaries, or from unused appropriations for salaries, shall be covered into the Treasury.

It is equally certain that any arrangement by which a substitute would, by reason of performing the duties of an officer, be entitled in future to receive any part of the salary of such officer is unlawful. There is no statute or rule of common law which sanctions a contract to give such right. It is expressly prohibited by the statute giving every officer a right to his salary, and by the statute declaring, that "all transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, * * * shall be absolutely null and void, unless * * * made * * * after * * * the issuing of a warrant for the payment thereof." (Rev. Stat., 3477.) It is well settled that this provision is not directory, but mandatory. Even without the statute such assignment of any part of a salary is void at common law as against public policy. (Claims-Assignment Case, *ante* 13; Bliss v. Lawrence, 58 N. Y., 442; Billings v. O'Brien, 45 How., N. Y., Pr., 400.) The statute cited, and the principles stated, may not all be applicable as to substitutes for "messengers, assistant messengers, copyists, watchmen, laborers, and other employés," but most of them are so, and exclude any authority to employ or pay substitutes.

The head of a Department may, at his pleasure, accept the resignation of, or remove, a clerk, and restore him to office, and in the mean time appoint another person to the vacant place, with a right to the whole salary prescribed by law. He may do the same with unofficial employés. But there can be no lawful arrangement between an officer or employé occupying a position in the Department and any other person as a substitute for a division of the compensation fixed by law.

In rare cases services may be provided for by contract. (Rev. Stat., 3577, 3578, 3679, 3733, 3737.) Neither the contract, nor the right to compensation under it, can be lawfully assigned. (Rev. Stat., 3737.) Under a general statutory power to make contracts for services, and to fix the amount of compensation, there may be a principal contractor, entitled to receive payment, and authorized to employ such persons, and on such terms as to payment, as he may deem proper. But when the head of a Department makes a contract for the services of specified persons at a fixed compensation for time of service, there can be no substitution of any other persons, except by mutual consent in a form equal to a new contract; and in no event can there be an arrangement to accept the services of a substitute, with a portion of the compensation for such service to be paid to any other person.

The Secretary of the Treasury is advised that the application in this case for permission to employ a substitute cannot lawfully be granted.

TREASURY DEPARTMENT,

First Comptroller's Office, December 20, 1882.

IN THE MATTER OF THE SETTLEMENT OF THE ACCOUNTS OF DIPLOMATIC AND CONSULAR OFFICERS.—CONSULAR-ACCOUNTS CASE.

1. The law requires that one set of the duplicate original vouchers, which are transmitted by diplomatic and consular officers to the Department of State, for sundry contingent and miscellaneous disbursements, shall be filed for settlement with the proper accounting officers of the Treasury Department.
2. The proper accounting officers of the Treasury Department are required to settle and adjust all such accounts. The approval thereof in the Department of State is not conclusive on the accounting officers of the Treasury Department.
3. This results from the fact, that the Bureau of Accounts in the Department of State cannot finally settle such accounts.
4. When a diplomatic or consular officer draws his draft on the Secretary of State for the purpose of raising money to make payment of such accounts, it should not be paid by the disbursing clerk of the Department of State, but upon a requisition made by the Secretary of State (with the draft attached) upon the Secretary of the Treasury, and the diplomatic or consular officer should be charged therewith.

The statute provides for a disbursing clerk in the Department of State. (Rev. Stat., 169, 173, 174, 176, 201.) The act of June 20, 1874 (18 Stat., 90), makes an appropriation "for six chiefs of bureaus, (consular, diplomatic, accounts, rolls and library, statistics, and indexes and archives,) at two thousand four hundred dollars each, fourteen thousand four hundred dollars." There is no statute which defines the duties of, or otherwise creates, a bureau of accounts, or a chief of such bureau, in the Department of State. The act of March 3, 1875 (18 Stat., 349), provides that "the chief of the Bureau of Accounts may be appointed by the head of the Department disbursing clerk of the Department of State."

In a correspondence between the Treasury and State Departments in 1882, questions were considered as follow : *

"1. Whether the disbursing clerk, who is chief of the Bureau of Accounts, and who settles sundry accounts of consular officers, and pays such balances as he finds due, must, in rendering his accounts to the Treasury Department, furnish the vouchers upon which he adjusted said accounts ?

"2. Have the accounting officers of the Treasury Department the right to re-examine those vouchers and to decide upon the audit of the Department of State; and are they restricted to evidence showing the payment of the money, the purposes for which it was paid, and that payment was approved by the Department ?

"3. In connection with this the inquiry arises, did the creation by Congress of a Bureau of Accounts in the Department of State invest that Department with authority to finally settle said accounts ?

"4. What is the proper mode of paying drafts drawn by diplomatic

* May 26, 1882, letter of the Secretary of the Treasury to the Secretary of State.

June 17, 1882, letter of Secretary of State in reply.

September 19, 1882, letter of William Lawrence, First Comptroller, to the Hon. Frederick T. Frelinghuysen, Secretary of State. (Letter Book, p. 233.)

and consular officers on the Secretary of State to secure payment of such accounts ? ”

A letter of the Honorable Secretary of State, dated June 17, 1882, to the honorable Secretary of the Treasury on these subjects was by the latter referred to the First Comptroller for his opinion, which was accordingly prepared and transmitted to the Secretary of the Treasury June 26, 1882.

September 19, 1882, the First Comptroller addressed a letter to the Honorable Secretary of State, saying:

“The accounts of R. C. Morgan, disbursing clerk of your Department, for contingent expenses of consulates, &c., to December 31, 1881, have been adjusted by the Fifth Auditor and referred to this office for final action.

“In the adjustment of said accounts the Auditor has thought proper to suspend all payments made by Mr. Morgan which are not sustained by the vouchers of the consular officer. In those cases where the consular officer has drawn on you for the amount shown by his account, and sustained by the proper vouchers, Mr. Morgan has paid the drafts from funds in his hands, and filed them and the account current as his vouchers in his accounts, retaining the vouchers on which the account was predicated. The Auditor does not deem these papers, supported by the vouchers, a proper warrant for him to allow the payment, and hence he has suspended said amounts.

“I find, upon an examination of similar accounts, that this practice has prevailed, and that the disbursements made by Mr. Morgan and his predecessors have been allowed upon similar evidence of payment, and in view of this fact, and that your Department has not been informed that any change in the practice had been made by the accounting officers, I have directed that the accounts now in my office be settled as heretofore, * * * so as to close out the last fiscal year. * * *.”

The letter then refers to the opinion given to the Secretary of the Treasury by the First Comptroller June 26, 1882, and gives a copy thereof, material portions of which are as follow :

The practice of settling these accounts (or a portion of them) in the Department of State is of long standing, and is prior to the organization of the Bureau of Accounts, and the payments made by the disbursing clerk on such accounts have been allowed by the Fifth Auditor and First Comptroller, upon the presentation of the account current and the receipt of the party to whom payment was made, or in cases where drafts are drawn, the surrender of the draft—the transaction bearing the approval of the Secretary of State or one of his assistants. This has always been considered a sufficient warrant for the disbursing clerk in the settlement of his accounts.

The Fifth Auditor * * * insists, that the vouchers appertaining to each consular account should be transmitted to the Treasury Department with the disbursing clerk's accounts.

The letter of the Secretary of State to the Secretary of the Treasury states that “The consular regulations prescribed by the President, and which have the force and effect of law, direct that certain specified accounts of consuls shall be transmitted directly to this (State) Department. Amongst these are rent and miscellaneous expenses, accounts for clerk hire and for pay of persons employed but not formally commissioned, as guards and interpreters' accounts, for rent of prisons, &c.—

in short, all accounts specially ordered by this Department.” It further states “that the Department of State is charged with their examination and adjustment. The right and the duty of this (State) Department to settle these accounts is not questioned by the Fifth Auditor, nor can it be questioned.”

The “consular regulations” referred to above are evidently as follow : Art. XXVI, section 500, page 173, which states that “the following separate accounts are to be *transmitted* to the Department of State,” as named above in the letter of the Secretary.

Section 501, page 174, designates the accounts to be sent directly to the Fifth Auditor. Section 502, page 174, states that the accounts sent to the Department of State should be in duplicate in order that *one set* may be retained in the Department. Sections 530 and 531, page 181, designate the Departments on which said officers shall draw drafts.

The act of June 20, 1874 (18 Stat., 90), organizing a Bureau of Accounts in the Department of State, does not confer any special powers to adjust accounts, but such Bureau of Accounts is simply designated as a bureau to receive and examine the accounts directed to be transmitted by section 500 of the Regulations. The act of March 3, 1875 (18 Stat., 349), authorizes the appointment of the chief of the Bureau of Accounts as disbursing clerk of the Department, but confers no powers on him other than those delegated to disbursing clerks *in the several Departments*.

It is admitted that the Regulations have all the force and effect of law, but only so far as they conform to the law. A regulation in violation of law can have no force or effect whatever. Regulations are for the purpose of securing uniform practice under the law, or, in other words, for more effectually carrying out the legal enactments to which they refer. Mr. Morgan, in the presentation of his accounts, furnishes the evidence of payment, the account on which the payment is predicated, and the official approval of the Department of said payment. He is an officer of the Department, and, as such, he must obey the mandates of the Secretary. He has accounted for the moneys received and disbursed by him, and his integrity is not questioned. The refusal to furnish the vouchers to the Fifth Auditor is not his, but that of the Secretary of State. His record, as to the performance of his duties, is full and clear. The question at issue is, can the accounting officers of the Treasury go behind that record [his action in approving accounts] ?

If he has the legal right to settle finally the accounts in question, under orders of the Secretary, or, in other words, if the Department of State can legally and finally settle them, its action cannot be revised nor reversed by any other Department, and consequently the vouchers are of no value to any other Department, other than those which show the nature and the amount of payment. The latter are necessary to show what appropriations should be charged or credited. As the practice now exists, a part of the accounts are settled by the Department of State, and a part by the Treasury Department. This presents a strange anomaly, and is conclusive to my mind that the present practice is wrong. If the Department of State can settle a portion of them, it can settle all, and the Treasury Department has no right to adjust any; and *vice versa*.

The Regulations require consular officers to *transmit* certain accounts and vouchers to the Department of State, but I fail to find any authority to settle them there. My construction of section 500 of the Regulations is, that the Department of State shall receive them, examine them, and, after approving or disapproving them, or any part of them, refer

them to the Treasury Department for settlement; and this opinion is confirmed by the clause in section 502 of said Regulations, which says, that "they should be prepared in duplicate, with duplicates of the accompanying vouchers, in order that one set may be retained in the Department." This, by implication at least, infers that the *other set* shall be sent to the Treasury Department for adjustment. This is confirmed by the clause of section 523 of the Regulations, that "the accounting officers [of the *Treasury*] * * * are required to see that no person receives money * * * but by lawful title."

Internal revenue officers are required to transmit certain accounts to the Commissioner of Internal Revenue, but, after they have been properly inspected by him, they are referred to the Auditor for settlement. The right to receive does not imply the right to adjust and settle finally.

Section 236 Revised Statutes enacts that "all claims and demands whatever by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Department of the Treasury." The proper construction of this section is, that all claims, demands, and accounts, *except in cases where Congress shall specifically state otherwise*, shall be settled here. In certain cases of payments under treaties, or by joint commission, as in the case of the fishery award, Congress enacted that the amounts should be determined and paid by the Department of State, otherwise it could not have been done.

Section 277 Revised Statutes states that "the Fifth Auditor shall receive and examine *all* accounts accruing in or relative to the Department of State." This refers to those claims and demands stated in section 236 Revised Statutes, and which, under section 500 of the Regulations, are transmitted to the Department of State. In short, this section designates who shall settle and adjust the accounts named in section 500 of the Regulations. Had the law contemplated the settlement of these accounts in the Department of State, it would have expressly stated it, as it does in defining the duties of the Fifth Auditor. [The statute expressly requires that "such accounts, with the *vouchers* necessary to the correct and prompt settlement thereof, shall be sent * * * to the Bureau to which they pertain."] (Rev. Stat., 3622; *Watkins v. United States*, 9 Wall., 764.) As the expenses named in section 500 of the Regulations are incurred under instructions of the State Department, it is necessary that they should be rendered to that Department for its scrutiny, in order to ascertain if the expenditures are proper, and in accordance with such instructions, before being adjusted as required by section 236 Revised Statutes; and the approval of the Department of State is a voucher to the accounting officers that the account is a proper one for examination and report in the Treasury Department. Consular officers are required to give bond for the faithful performance of their duties, and for the payment of balances found due to the United States. These balances must be ascertained on an account stated by the Fifth Auditor, and certified by the Comptroller to the Register of the Treasury, where it is officially recorded. (Rev. Stat., 191.)

Section 269 Revised Statutes makes it the duty of the First Comptroller "to superintend the recovery of all debts *certified by him* to be due to the United States, and for that purpose to direct all such suits and legal proceedings." Hence he can only institute suits for balances found due by the Treasury Department and certified by him. The law evidently designs that the accounts of consular officers shall be settled in such manner as will render their sureties liable for balances due to the United States as certified by the First Comptroller, and, in order to do

this, they must be adjusted by the Fifth Auditor and eventually become a matter of record on the books of the Treasury. The First Comptroller cannot institute suits on accounts settled in the Department of State, as there is no record here of such transactions. In a word, the practice of settling such accounts in the Department of State [in practical effect] bars the Government from legal proceedings against the sureties.

In the case of George C. Driggs, late commercial agent at Hull, who, in the opinion of the Secretary of State, was a debtor to the United States, the Solicitor of the Treasury was asked to institute proceedings against his sureties to recover the amount due. The Solicitor requested the First Comptroller to prepare the necessary papers, but an examination of the books of the Treasury Department showed that no such accounts had been settled there, and no balances had been certified by the Comptroller. No transcript could be furnished, and no action could be had against the sureties. This case is fully set out in letter of January 19, 1882, to the Solicitor of the Treasury.

There can be no question that the law contemplates and requires that the accounts of all officers of the United States, and especially of those officers who give bonds, and who are of themselves and with their sureties directly amenable to the Government, "shall be settled and adjusted in the Department of the Treasury." Their bonds are filed in the Treasury Department, in order that they may be prosecuted to recover amounts due the Government, and this cannot be done unless the accounts are settled in the Treasury Department. As officers of the Government, their accounts must be settled in their names, and they be held responsible. When such accounts are settled in the Department of State, and the payments made by the disbursing clerk there, the consular officer and his sureties are released from all responsibility, and the disbursing clerk becomes liable in his stead. Such a practice is not only inexpedient, but is, in my opinion, without warrant of law.

If the Department of State can settle a part of the accounts of consuls, for contingent expenses, it should settle them all, but this it is unable to do in cases where the fees are applied to such expenses, and hence they cannot be divided between two Departments. The Department of State is as fully competent to settle accounts for relief of seamen—in fact every account consular officers may render; for the right to settle one implies the right to settle all.

As I have stated, my opinion is, that the right of a Department to settle and pay an account carries with it the right to retain the vouchers, and that the only duty left for the Treasury Department to perform in such cases is, to ascertain that the payments were made from the proper appropriations and under proper approval. Such has been the practice heretofore, and, as the accounts now before me conform to that practice, and as neither the State Department nor its disbursing clerk has been informed that any change was contemplated, I shall allow the accounts here, as formerly, so that, in justice to the Department of State, this practice should continue, until due notice has been given to the contrary.

I am fully convinced that said practice is contrary to the provisions of law; that it should, without delay, be changed to conform thereto; that all such accounts, after being examined in the Department of State, should, with the vouchers, be referred to the Fifth Auditor for settlement and report; and that, when drafts predicated on such accounts are drawn on the Secretary of State, they should not be paid by the disbursing clerk of the Department of State, but upon a requisition of the Secretary of State (with the draft attached) upon the Secretary of the Treasury, and the consular officer charged therewith. Diplomatic

or consular officers do not advance money to pay such vouchers. They respectively draw drafts on the Secretary of State, and negotiate them with bankers abroad, and in settlement of their accounts in the Treasury Department they are credited with vouchers, and with loss by exchange, and charged with the amount of the drafts.

This practice will comply with the law, will give the Department of State the same control over the accounts that it now has, will make the officers liable under their bonds for moneys due from them, and will make the records of the Treasury Department a complete exhibit of their accounts with the Government.

I therefore suggest that this practice commence with the present fiscal year.*

TREASURY DEPARTMENT,

First Comptroller's Office, December 22, 1882.

* The classes of accounts, to which reference is here made, are generally such as are covered by appropriations in the consular and diplomatic appropriation act of March 3, 1883, as follow :

For contingent expenses of foreign intercourse proper, and of all the missions abroad, eighty-five thousand dollars.

For contingent expenses of United States consulates, such as stationery, book-cases, arms of the United States, seals, presses, and flags, rent, freight, postage, and other necessary miscellaneous matters, one hundred and ten thousand dollars.

For bringing home from foreign countries persons charged with crimes, and expenses incidental thereto, five thousand dollars.

For expenses which may be incurred in acknowledging the services of masters and crews of foreign vessels in rescuing American citizens from shipwreck, four thousand five hundred dollars.

To meet the necessary expenses attendant upon the execution of the neutrality act, to be expended under the direction of the President, pursuant to the requirement of section two hundred and ninety-one of the Revised Statutes, ten thousand dollars, or so much thereof as may be necessary.

For contribution to the maintenance of the International Bureau of Weights and Measures, in conformity with the terms of the convention signed May twentieth, eighteen hundred and seventy-five, to be expended under the direction of the Secretary of State, two thousand two hundred and seventy dollars.

For contribution to the maintenance of the International Prison Commission, to be expended under the direction of the Secretary of State, two hundred and fifty dollars.

There are some other special accounts of the same character. The appropriation act provides for expenses as follow :

For rent of prisons for American convicts in Siam and Turkey, and for wages of keepers of the same, two thousand dollars.

For rent of prison for American convicts in China, one thousand five hundred dollars.

For wages of keepers, care of offenders, and expenses in China, nine thousand five hundred dollars.

For rent of prison for American convicts in Japan, seven hundred and fifty dollars.

For wages of keepers, care of offenders, and expenses in Japan, five thousand dollars.

For rent of court house and jail, with grounds appurtenant, at Yeddo, or such other place in Japan as shall be designated, three thousand eight hundred and fifty dollars.

For rent of buildings for legation and other purposes at Peking, or such other place in China as shall be designated, three thousand one hundred dollars.

Under the above appropriations, consular officers draw for the amounts due, as shown by their accounts, and their drafts are paid by requisitions on the Secretary of the Treasury, and their accounts settled in this Department as provided by law. Diplomatic officers draw on the Secretary of State—consular officers, marshals, and interpreters draw for their salaries on the Secretary of the Treasury.

IN THE MATTER OF THE RIGHT OF A REPRESENTATIVE IN CONGRESS TO COMPENSATION FOR SERVICES RENDERED THE UNITED STATES, DURING HIS TERM AS REPRESENTATIVE, BUT NOT PERTAINING TO HIS DUTIES AS SUCH.—CROWLEY'S CASE.

1. The inhibition in section 1765 of the Revised Statutes against the payment to any "officer," or "other person," of "any additional pay, extra allowance, or compensation," does not apply to a Representative in Congress.
2. Long continued usage and contemporaneous construction are strong evidence of what the law is.
3. It may be conceded, however, that "no usage is of any avail" as against a statute clear in its terms and free from all ambiguity.
4. A Representative in Congress is, in the technical, legal, and popular sense, an "officer," but he is not so within the meaning of all the provisions of the Constitution, or statutes, relating to officers.
5. The Constitution and statutes frequently use words in a limited sense. The meaning of words will vary with the subject, context, and other circumstances.
6. Congress is not a "branch of the public service" within the meaning of section 1765 of the Revised Statutes. It is an entire body, incapable in its legislative capacity of having *such branches* as are provided for by various statutes to render public service.

From May 2 to December 1, 1882, Hon. Richard Crowley rendered services to the United States as an attorney-at-law, assisting the district attorney for the district of New York in sundry matters, for which purpose he was retained by the Attorney-General, by virtue of section 363 of the Revised Statutes. His account for services, duly approved by the Attorney-General, for \$3,480.70, and certified December 15, 1882, as required by section 365 of the Revised Statutes, was presented to the First Auditor December 16, 1882. The First Auditor referred the account to the First Comptroller, "for decision as to whether the inhibition in [section] 1765 [of the Revised Statutes] applies to this case," inasmuch as the claimant, during the period of his service ~~as~~ attorney, was, and yet is, a Representative in Congress.

Hon. Richard Crowley submitted an argument as follows:

I respectfully beg leave to submit that I am not within the provisions of section 1765 of the Revised Statutes of the United States.

The first legislation, out of which section 1765 grew, was March 3, 1839, [5] U. S. Statutes at Large, pp. 339-349, and is section 3 of an act entitled:

"An Act making appropriations for the civil and diplomatic expenses of the Government for the year eighteen hundred and thirty-nine."

It makes appropriations for and relates wholly to the executive and administrative officers and Departments of the Government, and not to the legislative.

Section 3 provides, "that no officer in any branch of the public service, or any other person whose salaries, or whose pay or emoluments is or are fixed by law and regulations, shall receive any extra allowance or compensation in any form whatever for the disbursement of public

money, or the performance of any other service, unless the said *extra allowance* or compensation be authorized by law."

I submit that this section, attached to an appropriation bill, relates only to the executive and administrative officers and persons named therein.

That it does not relate to Representatives in Congress, for they are not officers or persons engaged in any branch of the public service as contemplated in that act and section.

Section 3, of the act of March 3, 1839, was enlarged by section 2 of the act of August 23, 1842,—5 U. S. Statutes at Large, pp. 508-510—entitled: "An Act making appropriations for the support of the army, and of the military academy, for the year one thousand eight hundred and forty-two," by adding after the words "authorized by law," the words, "and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation."

This addition, if I am right in my construction of the first act, does not extend its provisions to Representatives in Congress. It leaves it still only applicable to officers and persons in the executive branches of the public service.

Chapter 88, of the [19] U. S. Statutes at Large of 1876, p. 45, does not affect the foregoing acts, or change their construction, being only a proviso as to the pay of certain commissioners mentioned therein.

Section 1765 of the Revised Statutes, as it now stands, contains only the provisions of section 3 of the act of March 3, 1839, as enlarged by section 2 of the act of August 23, 1842.

From the titles of those acts and their provisions, they relate, I submit, only to officers and persons in the executive and administrative branches of the public service.

They do not and were not intended by Congress to include Representatives in Congress.

They were intended to apply to officers and persons in the public service provided for in said acts, who received fixed salaries, pay or emoluments for their services, and whose time and services belonged to the Government, and who, if they received any *additional pay, extra allowance or compensation* from the Government, must receive it as authorized by some other law, and through an appropriation therefor explicitly stating that it is for such *additional pay, extra allowance, or compensation*.

December 19, 1882, the First Comptroller gave an opinion to the First Auditor, saying:

The inhibition of section 1765 does not apply to members of Congress. It applies to persons "in any branch of the public service." A Representative in Congress is not in a "branch of the public service." He is a component part of an entire department of the public service, and, in this respect, he is different from an administrative officer, who, necessarily, acts, not as a component or co ordinate part of one of the three great departments of the Government, but, as the statute says, in a "branch of the public service."

The Auditor thereupon stated an account in favor of the claimant, and made report to the First Comptroller, who certified a balance due the claimant, and a warrant for payment issued.

Hon. H. F. French, the Assistant Secretary, to whom the warrant in payment of this claim was submitted to be signed, informally called the attention of the First Comptroller (Rev. Stat., 191) to the question

whether the claimant was not within section 1765 of the Revised Statutes a "person whose salary" was fixed by law, and, if so, whether section 1765 did not extend its inhibition to all such persons generally, and not merely those of such persons in a "branch of the public service."

OPINION BY WILLIAM LAWRENCE, *First Comptroller*:

Section 1765 of the Revised Statutes provides that "no officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever, for the disbursement of public money, or for any other service or duty whatever, * * *."

The inhibition of this section does not apply to a Representative in Congress. This conclusion is fully supported by usage, eminent authority, and approved construction.

I. Long-continued usage has so determined. It is matter of current history, that Representatives in Congress have, in some instances through a period covering many years, been employed by executive officers to render professional services as attorneys for the Government, and they have been regularly paid. The fact has been alluded to in debates in Congress, but no objection has been made as to any right to payment arising under the statute now in question. (See debates House of Representatives, April 30, 1866, vol. 71, Cong. Globe, part 3, 1st sess., 39th Congress, page 2296, &c.)* Long-continued usage and contemporaneous construction are strong evidence of what the law is. (Broom, Legal Maxims, 682.)

It may be conceded that, "as against a *plain* statutory law, no usage is of any avail." (Broom, Legal Maxims, 684; *Swift Co. v. United States*, 105 U. S., 695.)

Undoubtedly, if the question were *res integra*, it would be open to inquiry whether the general and comprehensive words employed in this statute and the policy of its provisions do not apply the inhibition thereof to Representatives in Congress. But the statute is not so clear and plain as to remove reasonable doubt on the subject. And it has been properly said that, if a statute "be susceptible of the interpretation which has been put upon it by long usage, the courts will not disturb that construction." (*Pochin v. Duncombe*, 1 H. & N., 856.)

II. The claim now under consideration has the approval (Rev. Stat., 363–365) of the Attorney-General advisedly given. The opinion of that learned and eminent lawyer is entitled to high respect, and should have persuasive weight.

* This is memorable as one of the somewhat exciting debates. It seems to have been assumed that the act of August 31, 1852, sec. 18, 10 Stat., 100 (now Rev. Stat., 1763), prohibited one person from holding two offices and receiving the salary prescribed by law for both, though it is well settled he may. (*Bender's case*, Second, 1 Lawrence, Compt. Dec., 401.)

III. This construction of the statute is supported by sufficient reason.

1. It must be apparent that, in the technical, legal, and popular sense, a Representative in Congress is an "officer"; and he is expressly designated as such (Rev. Stat., 28, 30, 1756, 1786), but he is not so within the meaning of all the provisions of the Constitution or statutes relating to officers.

2. The Constitution and statutes may, and frequently do, use words in a limited or restricted sense. A learned judge has said, "There is no word in the *English* language which does not admit of various interpretations." (*Regina v. Skeen*, Bell, U. C., 134; Bishop, *Written Laws*, 92 *d.*) The meanings of words "will vary with the subject, context, and other circumstances." (*Id.*, 93.) The object of all construction is to ascertain the intention of the law-maker.

3. The question now presented is, whether Congress, by the use of the words "officer" or "person," in section 1765 of the Revised Statutes, intended either of them to include a Representative in Congress. It may well be concluded that Congress did not so intend.

a. As early as 1799 it was determined by the Senate that a Senator was not a civil officer of the United States within the meaning of Article II, section 4, of the Constitution. This section provides for the removal from office of "the President, Vice-President, and all civil officers of the United States" on impeachment. In the case of Blount, a member of the Senate, that body determined that he was not, for the purpose of impeachment, a civil officer. (Story, *Const.*, §§ 791-794, citing Senate Journal, January 10, 1799; 4 Tuck., *Blackst. Com.*, App., 57, 58; Rawle, *Const.*, ch. 22, pp. 213, 214, 218, 219; The Federalist, No. 66; South Carolina Debates on Const., January, 1788 (Charleston, 1831), 11-13; Blount's Trial, 34-52.) Judge Story says, "It was probably held that 'civil officers of the United States' meant such as derived their appointment from and under the National Government, and not those persons who, though members of the Government, derived their appointment from the States, or the people of the States"; and he discusses the subject and assigns other reasons at some length. (Story, *Const.*, § 793, see *Const. U. S.*, Art. I, sec. 6; Art. II, sec. 1; Art. II, sec. 3; Art. XIV. sec. 3.) The reasons which apply to Senators do not fully apply to Representatives, since Congress may by law provide for the election of Representatives. (*Const. U. S.*, Art. I, sec. 4.) From this early decision of the Senate, and since that time, members of Congress have been regarded in legislation as not generally included by the term "*officer*." Statutes designed to include them have frequently, if not generally, done so, by designating them as members of Congress, and by regarding them as distinct from officers generally. Thus, in the Revised Statutes:

"SEC. 1781. Every member of Congress or any officer or agent of the Government," &c.

"SEC. 1782. No Senator, Representative, or Delegate, after his election * * * and no head of a Department, or other officer," &c.

See Revised Statutes, 1058, 3739–3742, 5450, 5451, 5498; act February 26, 1853, secs. 2, 3, 6, 10 Stat., 170, 171; and the learned and able opinion of the Attorney-General of July 21, 1882, as to sec. 6 of the act of August 15, 1876, 19 Stat., 169. This general course of legislation shows that Congress, when intending in a statute to include its own members, has, as stated, designated them as such members. It may be well concluded, then, in view of all this, that the word “officer,” in section 1765 of the Revised Statutes, does not include members of Congress.

4. The word “person” in this section does not include members of Congress.

a. This conclusion would follow from the legislative usage, already stated, of expressly specifying members of Congress in statutes designed to include them.

b. Besides this, or aided by the foregoing consideration, it may reasonably be inferred that the word “person” was used for a wholly different purpose. In every “branch of the public service” there are *officers*, and others employed who are not officers. The word “person” was introduced to supplement the word “officer,” and to include all persons in those branches of the public service where there were officers proper, and employes not officers, and in those branches, also, if any, in which there might be no officers, but employes, with compensation “fixed by law or regulations.” If, in this statute, the word “person” be enlarged in its meaning to include members of Congress, it will be the first, and only, statute in which members of Congress have been included by such term, and in any similar connection. It is not reasonable to suppose the word “person” was introduced for any such purpose. It has ample scope for operation without so extending it. And when such ample scope is found, sufficient to satisfy the word and its purpose, there is no rule of construction which permits it to be extended further. Such a construction, in view of the mode employed in legislation designed to include members of Congress, would find no justification.

5. The statute, in referring to officers and persons “in any *branch* of the public service,” does not include the legislative power of the Government. Congress did not in this section exclude *all officers and persons in the public service*, but only those in a “*branch of the public service*.” If the purpose had been to exclude all, the appropriate expression would have been, “all officers and persons *in the public service*.” This would have included members of Congress. But Congress did not use this expression. The statute assumes that there are *branches* of the service. It is the purpose of construction to ascertain what is, and what is not, a branch. It is a rule of construction that “every *word* and *clause* should, if possible, have assigned to it a meaning, leaving no useless words.” (Bishop, Written Laws, 82, citing Bac. Abr., Statute, I, 2, &c.) The expression “branch of the public service” must have a meaning and purpose, if possible. If there is any “public service”

which Congress could have intended to exclude as not a branch, the statute must be so construed. The Constitution assigns "all legislative powers" to Congress, "the executive power" to the President, and "the judicial power" to the courts. It classifies powers. The executive power has many *branches* to carry out its purposes. The seven Executive Departments, the Department of Agriculture, the Government Printing Office, the Territorial Governments, the Government of the District of Columbia, are all branches of the public service, are portions, or branches, of one of what are popularly called the three great Departments of the Government, but properly, in legal sense, the three powers thereof. The expression, "any branch of the public service," is very comprehensive. Its (1) *language*, its (2) *policy*, and (3) the evils which the statute was designed to avert, all unite in requiring it to be so construed as to carry out its salutary purposes. The "public service" includes the Government of the District of Columbia and the Territorial Governments. These governments exist by authority of Congress. If the officers and other persons authorized to act in these Governments are not in the "public service," in what service are they? Certainly not private service. If the District Government is a municipal corporation, the service under it is nevertheless public. The National Government itself is a public political corporation. A Territorial Government is a corporation.

It is immaterial how "public service" is rendered, the statute includes in it all its branches, unless some one is clearly excepted. Exceptions can only be engrafted on general comprehensive language when such purpose clearly appears. It is scarcely to be supposed that Congress intended to except the Territories and the District of Columbia from the operation of the statute. It is founded on a wise policy. If clerks and employes can secure extra compensation for service out of usual office hours, a great inducement would be held out to omit proper service at the proper time. This would operate as a premium for negligence and inattention to duty. It would operate as an incentive to increase compensation beyond that fixed by law. It would secure a preference to clerks and employes in the Territories and the District not accorded in the Departments of the Government. The statute does not limit its prohibition to clerks, officers, and employes of the United States, but extends it to every "branch of the public service," however that branch may exist or be organized.

This question is perhaps generally immaterial in the District, since the service of clerks and other employes is specifically provided for at fixed compensation, and no appropriation is made for service beyond that authorized for such clerks and employes. This will be manifest by reference to the appropriation acts. Reference is made to this subject simply to show that section 1765 of the Revised Statutes is to be so construed as to remedy the evils at which it is aimed, and that the claimant in this case is only excepted for reasons which take him out of the statute.

It must be assumed that the expression, "in any branch of the public service," had some purpose. If Congress had applied the prohibition

to any person in the public service, in any form, it would have used a more comprehensive expression.

The word "person" is used in its most comprehensive sense in section 1766 of the Revised Statutes, as follows:

"SEC. 1766. No money shall be paid to any person for his compensation who is in arrears to the United States, until he has accounted for and paid into the Treasury all sums for which he may be liable. In all cases where the pay or salary of any person is withheld in pursuance of this section, the accounting officers of the Treasury, if required to do so by the party, his agent or attorney, shall report forthwith to the Solicitor of the Treasury the balance due; and the Solicitor shall, within sixty days thereafter, order suit to be commenced against such delinquent and his sureties.

This is broad enough to include members of Congress, and would be so construed, unless the Constitution, in a form which cannot be defeated by statute, had secured payment to them. Every court is a "branch of the public service," and a part of one of the three great powers. There may be branches of the public service connected with Congress, its reporters, clerks, and other officers and employés who perform duties assigned them by law in their peculiar branches of the public service. In popular language each of the three great powers of Government are called "Departments," and sometimes "branches." Thus, in *Ervine's Appeal* (16 Pa. St., 268), the judiciary is referred to as a "co-ordinate branch of the Government." But these are not technical, legal terms. The Congress proper, the two Houses clothed with the law-making power, cannot be said to be a "branch of the public service" in the sense of any of those branches named as such. The Constitution designates it as the body in which is "vested" "all legislative powers." This body is not, in a technical, legal, and constitutional sense, a "branch of the public service." It is an independent co-ordinate body, clothed with sole undivided power, an entirety, complete in itself, co-operating with the President. When Congress passed the acts of March 3, 1839 (5 Stat., 349, sec. 3), and August 23, 1842 (5 Stat., 510, sec. 2), carried into the Revised Statutes as section 1765, it was dealing with branches of the public service, not with members of Congress. These were appropriation acts on which was engrafted permanent legislation. These were followed by the act of August 26, 1842 (5 Stat., 525, sec. 12), carried into the Revised Statutes as section 1764, which deals with officers or clerks in *Departments*. The whole legislation shows that Congress was dealing with officers, clerks, and employés, but not with its own members. In view of all this, it is held that the claimant is entitled to payment, and the First Comptroller will countersign a warrant for payment.*

TREASURY DEPARTMENT,

First Comptroller's Office, December 23, 1882.

* The warrant was signed, countersigned, and paid accordingly.

IN THE MATTER OF COMPENSATION FOR PREPARING A DIGEST OF THE RULES OF THE HOUSE OF REPRESENTATIVES.—SMITH'S CASE.

1. The "legislative," &c., appropriation act of August 5, 1882 (22 Stat., 221), appropriates money to pay the journal clerk of the House of Representatives an annual salary of \$3,000, and "for preparing Digest of the Rules, one thousand dollars." The "sundry civil" appropriation act of August 7, 1882 (22 Stat., 338), appropriates money "to pay to the officers and employees of the House of Representatives borne on the annual and sessions rolls on the fifteenth day of June, eighteen hundred and eighty-two, one month's extra pay." Held: (1) The sum of \$1,000 so appropriated by the act of August 5, 1882, is compensation for a specific service, and is payable in gross when the work of "preparing [a] Digest of the Rules" is completed. (2) This sum of \$1,000 is no part of the annual salary of the journal clerk. (3) In computing the annual salary of the journal clerk for payment of the "one month's extra pay" under the act of August 7, 1882, the compensation "for preparing Digest of the Rules" is not to be included. (4) In the construction of a statute, the intention of Congress, plainly manifest, will prevail over the mere letter of the statute. (5) A statute should, if its language will fairly admit of it, be so construed as to avoid absurd or unjust consequences.

The act of August 5, 1882 (22 Stat., 219, 221), "making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes," declares:

"That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, in full compensation for the service of the fiscal year ending June thirtieth, eighteen hundred and eighty-three, for the objects hereinafter expressed, namely:

* * * * *

"For compensation of the officers, clerks, messengers, and others in the service of the House of Representatives, three hundred and twenty-seven thousand six hundred and eighty-seven dollars and sixty cents, namely: For Clerk of the House of Representatives, including compensation as disbursing officer of the contingent fund, four thousand five hundred dollars, and for hire of horses and wagons for the use of the Clerk's office, six hundred dollars; for chief clerk, *journal clerk*, two reading clerks, and tally clerk, five in all, at *three thousand dollars each*, and for the *journal clerk for preparing Digest of the Rules*, one thousand dollars; for printing and bill clerk, two thousand five hundred dollars; for disbursing clerk, file clerk, and enrolling clerk, three in all, at two thousand two hundred and fifty dollars each," &c., &c.

The salaries mentioned are payable monthly. (Rev. Stat., 53, 58, 3622; 1 Lawrence, Compt. Dec., App., ch. XV, 630.

December 12, 1882, Hon. Edward McPherson, Clerk of the House of Representatives, addressed a letter to the First Comptroller, inclosing for his consideration a letter dated December 9, 1882, from Henry H. Smith, journal clerk of the House, in which Mr. Smith refers to the decision of the Comptroller of August 21, 1882, and claims that the appropriation of \$1,000 "for preparing Digest of the Rules" is "a part of"

his "*annual compensation as journal clerk, and payable monthly.*" Mr. Smith in his letter also refers to the appropriations for similar services in the acts of March 3, 1877 (19 Stat., 371), June 21, 1879 (21 Stat., 26), and June 15, 1880 (21 Stat., 214), under which he "was paid monthly by voucher for such additional services" until June 30, 1882, when, under the decision of the First Comptroller, that mode of payment ceased. The decision referred to was the First Comptroller's letter to the Clerk of the House, dated August 21, 1882, in which it was held that said sum of \$1,000 was to be paid "at the completion of the work of preparing a Digest of the Rules."

OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

The question presented is not at all difficult, and it is only submitted in this form so that it may be regarded as settled.

1. The act of August 5, 1882 (22 Stat., 221), appropriates \$1,000 "for the journal clerk for preparing Digest of the Rules." This is a plain, unambiguous declaration that the sum named is appropriated to be paid for a specific service, to wit: "for preparing Digest of the Rules." When this service is performed, the right to payment is fixed. Upon the language of the statute, this is the evident purpose of Congress. This sum, so appropriated, is not a salary to be paid in monthly installments.

2. The construction placed upon the statutes, authorizing payment to the reporter of the decisions of the Supreme Court of the United States, supports the view already presented. That officer has uniformly been paid a gross sum on the completion of a volume of reports, and not in monthly installments. (Otto's Case, *ante* 301.)

3. This view is supported by authority. The statutes of Ohio required the reporter of the supreme court to attend the sessions of the court in banc and report the cases decided. Only one term was authorized each year. The reporter prepared the 20th volume of Ohio reports, but, before the expiration of the year, his office expired by operation of the new constitution of 1851. The court decided that the reporter was entitled to the full annual salary, and that, too, on completion of the work before the expiration of the year. The court said:

"Where the duties of an officer entitled to an annual salary are of such a nature that all his duties for the year may be performed and completed within less time than the year, the compensation for the entire year would be payable, in case the duties required by law for the year are performed, although the office might be abolished before the end of the year." (William Lawrence, *Ex parte*, 1 Ohio St., 431.)

The principle applies even more strongly when the compensation is provided, not as an *annual salary* for a specific purpose, but *for a specific service*, as in the act of August 5, 1882. The reason of the decision quoted is not fully stated. But it is evident the court held that, al-

though the law called the compensation annual salary, yet, in fact, the legislature intended it as compensation for a specific service, and that the spirit and purpose of the statute should prevail over its mere letter.

4. Another rule of construction supports the conclusion now arrived at. Bishop says, "the interpretation should lean strongly to avoid absurd consequences, injustice, and even great inconvenience." (Written Laws, 82.) The provision of the act of August 5, 1882, now in question, is to be construed with reference to the history and policy of similar provisions. These may be passed at such a time as to require the whole service of preparing a digest of rules to be performed in the first half, or the last half, of a given fiscal year. This may result from express provision, or from the time when the act is passed. Yet, if the whole service is performed in the first half of a year, and the claimant should then die, it would be great injustice to say that full payment for the whole service should not be made. If the service be rendered in the last half of a fiscal year, and payment for it is to be called part of the annual salary of a journal clerk for that year, it would be difficult to perceive how he could be paid as for such salary for that period of the year prior to the time when the appropriating and authorizing act passed. The clear justice and purpose of all such acts is to pay a fixed sum for a given service. The question, whether the Digest to be prepared under the act of August 5, 1882, is to include the rulings of the presiding officers of the two houses of Congress to the end of the present session is one not presented for consideration. But if so, payment can only be made on completion of the work.

5. The "sundry civil" appropriation act of August 7, 1882 (22 Stat., 338), makes an appropriation as follows:

"To enable the Clerk of the House to pay to the officers and employees of the House of Representatives borne on the annual and sessions rolls on the fifteenth day of June, eighteen hundred and eighty-two, *one month's extra pay at the compensation then paid them by law*, which sum shall be immediately available."

This "one month's extra pay" is to be computed on the basis of the annual salary prescribed by law. The compensation for preparing the Digest of Rules is no part of the annual salary of the journal clerk, and, hence, is not to be taken into account in fixing the amount of the "one month's extra pay." It is nowhere called *salary*, nor is any expression used which can classify it as such. Preparing the Digest of Rules is no part of the duty of the journal clerk in his capacity as such. It is a duty assigned to the person who may be journal clerk, and could, of course, be assigned to any other person, whether holding a clerkship or not.

The Clerk of the House of Representatives will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 29, 1882.

IN THE MATTER OF THE PAYMENT OF EXPENSES INCIDENT TO THE DISPOSITION OF OSAGE TRUST AND DIMINISHED-RESERVE LANDS AND OSAGE CEDED LANDS IN KANSAS.—OSAGE-LAND CASE.

1. The opinion in the *Indian-land case* (2 Lawrence, Compt. Dec., 369), re-examined and affirmed.
2. The principles applied in that case to the act of May 28, 1880 (21 Stat., 144, sec. 5), are not applicable to the provisions in very different language of the act of August 5, 1882 (22 Stat., 267), providing in express terms for the payment of "all expenses incident to the disposition of" the lands therein mentioned "out of the sums realized from the sales thereof."
3. Where a statute materially differs in its language from a prior statute on the same subject, an intended change of the law may be presumed.
4. A subsequent statute as to a particular subject will not be construed as making an exception to the provisions of a prior statute including the same and other subjects in general terms, unless such intention clearly appear in the later statute.
5. The act of August 5, 1882 (22 Stat., 267), clearly engrafts an exception on section 3617 of the Revised Statutes, and, in explicit language, expressly requires "that all expenses incident to the disposition of" the lands therein mentioned "shall be paid by the receivers of public moneys out of the sums realized from the sales thereof."
6. A provision directing the payment of expenses therein specified out of moneys therein named will be more readily construed as having the effect of an appropriation when found in an appropriation act, than when found in an act apparently intended as general permanent legislation only.
7. The *specific provisions* of one statute control the *general provisions* of another statute on the same subject, without reference to the dates of the statutes.
8. The proper construction of one clause of a statute is frequently aided by the language and purpose of other clauses *ejusdem generis*, upon the maxim, *noscitur à sociis*.
9. The treaty making power and the "Civilization Fund" referred to.

December 5, 1882, the Commissioner of the General Land Office addressed a letter to the Secretary of the Interior, calling his attention to the provisions of the deficiency appropriation act of August 5, 1882 (22 Stat., 267), relating to the expenses of the sale of the lands therein mentioned, and requesting that "the matter be submitted to the First Comptroller * * * for his decision as to whether the act of August 5, 1882, repeals section 3617 [of the Revised Statutes], in so far as the proceeds of the sales of the lands in question are concerned." He also calls attention to the *Indian-land case* (2 Lawrence, Comp. Dec., 369). December 7, 1882, the Secretary of the Interior transmitted to the Secretary of the Treasury a copy of said letter, with a request that the inquiry therein may be answered.

December 11, 1882, the Secretary of the Treasury referred these papers to the First Comptroller "for his decision."

Said act of August 5, 1882 (22 Stat., 265-267), under the caption of "Indian Affairs," makes sundry appropriations and provisions as to In-

dians and Indian lands, and then makes appropriations with provisions as follow :

To reimburse what is commonly known as the "civilization fund," the amount taken therefrom to defray the expenses of the removal of certain North Carolina Cherokee Indians to the Indian Territory during the year eighteen hundred and eighty-one, two thousand nine hundred and thirty dollars and fifty cents.

This amount, to be expended for the Osage Indians, in accordance with section twelve of the act approved July fifteenth, eighteen hundred and seventy, being interest at five per centum, as provided for in said act, and by section two of the act approved May ninth, eighteen hundred and seventy-two, from July first, eighteen hundred and eighty, to April twenty-fifth, eighteen hundred and eighty-two, on the following amounts, being the net avails of Osage trust and diminished-reserve lands sold by the United States prior to January first, eighteen hundred and eighty-two, as follows :

On five hundred and thirty-five thousand one hundred and seventeen dollars and seventy-three cents, from July first, eighteen hundred and eighty, to March first, eighteen hundred and eighty-one, seventeen thousand eight hundred and thirty-seven dollars and twenty-five cents;

* * * * *

On fifty-eight thousand seven hundred and fifty-five dollars and fifty-two cents, from January first, eighteen hundred and eighty-two, to April twenty-fifth, eighteen hundred and eighty-two, nine hundred and thirty-eight dollars and forty-five cents; in all, one hundred and eighty-nine thousand nine hundred and fifty-one dollars and seventeen cents:

Provided, That all expenses incident to the disposition of Osage trust and diminished-reserve lands and Osage ceded lands in Kansas shall be paid by the receivers of public moneys out of the sums realized from the sales thereof, under the direction of the Secretary of the Interior; and all sums heretofore paid on account of the disposition of said lands shall be reimbursed the several appropriations out of which the same may have been paid, from the proceeds of the sale of said Osage trust and diminished-reserve lands and Osage ceded lands.

See acts of August 11, 1876 (19 Stat., 127), May 28, 1880 (21 Stat., 143), June 16, 1880 (21 Stat., 291), and March 3, 1881 (21 Stat., 509); and sundry appropriation acts in relation to said lands and Indians.

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OPINION BY WILLIAM LAWRENCE, *First Comptroller.*

An opinion is very properly asked, in advance of the time when a formal decision would be required in settling the accounts of the expenses of the sales of the lands referred to in the act of August 5, 1882 (22 Stat., 267). The question submitted is, in effect, whether the *gross proceeds* of the sales of these lands are to be covered into the Treasury, or whether, without any appropriation act, other than the act of August 5, 1882, the "expenses incident to the disposition of" said lands "shall [first] be paid by the receivers of public moneys out of the sums realized from the sales thereof." In other words, does this act, as to the amount of such expenses, engraft an exception on the provisions of section 3617 of the Revised Statutes, requiring "the gross

amount of all moneys received from whatever source for the use of the United States, * * * [to] be paid * * * into the Treasury " ?

It seems to have been supposed that the opinion in the Indian-Land Case (2 Lawrence, Compt. Dec., 369), might settle the question now under consideration. That opinion discusses a question somewhat analogous in principle, but not at all identical. It held, in substance, that the act of May 28, 1880 (21 Stat., 144, sec. 5), determined, (1) that the register and receiver therein referred to should be allowed for the sale of "*Indian lands*" the same fees as are allowed by law for the sale of "*public lands*" (see School-Fund Case, 2 Lawrence, Compt. Dec., 592, *note*), and (2) that "the *net* proceeds of the sales" of the lands therein mentioned should be deposited in the Treasury "to the credit of the proper Indian fund"; but that it *did not* make (3) any disposition of the residue of the proceeds of sales equal in amount to the "expenses of such [sales and] disposals," and, hence, that (4) this amount was subject to the operation of section 3617 of the Revised Statutes. The provision of the act of May 28, 1880, (1) declaring the right to fees, was evidently inserted to avoid any doubt growing out of the difference between "*Indian lands*" and "*public lands*"; the provision, (2) that only "*net* proceeds of the sales" should be deposited in the Treasury "to the credit of the proper Indian [civilization] fund" was necessary, because, by the Osage Treaty, proclaimed January 21, 1867 (14 Stat., 687), the net proceeds were to go to the credit of the Indian "civilization fund," and (3) the residue was to reimburse the United States "the cost of survey and sale"; and (4) no part of this residue was appropriated to be paid to officers for fees, because Congress had otherwise appropriated such sums for salaries as was deemed proper.

The Indian-Land Case was properly decided, and is affirmed. But the act of August 5, 1882, is essentially different in terms from the act of May 28, 1880. The act of August 5, 1882, seems to have been prepared with reference to the opinion in the Indian-Land Case, and it provides in express terms for the payment of the expenses of sales, as the act of May 28, 1880, does not. These acts relate to the same subject, and dispose of the proceeds, or rather so much thereof as equals the expenses of the sales of the lands, by distinctly different modes of expression. This difference is so marked, it must be presumed that Congress had a purpose in making the change. Thus, it is said, "where a statute differs in its language from a prior statute on the same subject, it is an intimation that a different construction is intended." (Sedgwick, Construction Stat. and Const. L., 2d ed., 212, *note*, citing *Rich v. Keyser*, 54 Pa. St., 86. See Bishop, Written Laws, 6, 95a, 98, citing *Lehman, Durr & Co. v. Robinson*, 59 Ala., 219; *Douglas v. Douglas*, 5 Hun., N. Y., 140; *State, ex rel. v. Clark*, State Auditor, 57 Mo., 25.)

An exception cannot be engrafted on section 3617 of the Revised Statutes without words clearly indicating such purpose. Its policy is wise, and cannot be dispensed with, except by words in a statute which ren-

der such purpose clear. (Bender's Case, 1 Lawrence, Compt. Dec., 326.) Such exception is not properly classed as a repeal, even as to the particular subject of the exception, but rather as "a modification of law by law." (Bishop, Written Laws, 165.) It is a limitation of the application of the prior general statute. (Dwarris, Stat., 2d ed., 513, 668; Bishop, Written Laws, 126, and cases cited.)

But the act of August 5, 1882, does, in clear and explicit language, imperatively *require* "that all expenses incident to the disposition of" the lands therein mentioned "shall be paid by the receivers of public moneys out of the sums realized from the sales thereof," thus engrafting an exception on section 3617 of the Revised Statutes. There are several considerations in favor of this construction.

1. The language of the act does not reasonably admit of any other interpretation. When the language of a statute is clear and explicit, there is no room for construction, and effect must be given to the words employed. (United States *v.* Fisher, 2 Cranch, 399; L., L., & G. R. R. Co. *v.* United States, 92 U. S., 733; Bishop, Written Laws, 70, 72, 80, 81, 116 *note*, 122, 145, 191; Sedgwick, Construction Stat. and Const. L., 2d ed., 195.) In such case the maxim applies, *a verbis legis non est recedendum*. The duty of those required to construe statutes is *jus dicere*, and not *jus dare*.

2. The proviso under consideration is found in an appropriation act, in which it was the purpose of Congress to make provision for payments. This fact is by no means conclusive, but it is an element entitled to weight, in ascertaining the intention of Congress.

3. The construction adopted is sanctioned by the rule that whatever is *given in particular* shall not be taken away by *general words*. (Sedgwick, Construction Stat. and Const. L., 2d ed., 360; Bishop, Written Laws, 64, 112*a*, 112*b*, 126, 131, 152, 156.) Thus it is said of statutes, "The more specific provision controls the general, without regard to their comparative dates; the two acts operating together, and neither one working a repeal of the other." (Bishop, Written Laws, 126; Proceeds of Sales Case, *ante*, 36; Steamboat Co. *v.* The Collector, 18 Wall, 487.) The result is, that the particular provision of the act of August 5, 1882, which devotes a portion of the proceeds of the sales of lands to the payment of expenses, controls and limits the general provisions of section 3617 of the Revised Statutes.

4. If it were necessary, the provision for payment of expenses in the act of August 5, 1882, might class it as one of those anomalous statutes, authorizing payments from money which has not been deposited or covered into the Treasury without an appropriation in the usual technical language of an appropriation act. There are some such statutes. (Direct-tax case, *ante*, 339 *note*.) But this is, in fact and legal effect, though not in technical form, or by a strict legal nomenclature, an appropriation act, since it explicitly authorizes and requires a certain amount to be devoted to specified objects.

5. Finally, the purpose of the act of August 5, 1882, to require the "expenses incident to the disposition of" Osage lands to be paid from "the sums realized from the sales thereof," may be inferred from other provisions of the act, *ejusdem generis*. One provision of a statute is frequently to be construed with reference to the language and purpose of other provisions, upon the maxim, *noscitur à sociis*. There are other provisions of this act which require a general adjustment of the accounts relating to all the sales of such lands, and the proper disposition or appropriation thereof. Thus, it is provided that "all sums heretofore paid on account of the disposition of said lands shall be reimbursed the several appropriations out of which the same may have been paid, from the proceeds of the sale," &c.

The act of August 5, 1882, is prospective in so far that it does not authorize "expenses incident to the disposition of" the lands therein mentioned, that may have accrued prior to its date, to be paid "by the receivers" directly "out of the sums realized from the sales thereof"; but these expenses, so accrued, must be paid out of the proper appropriations therefor, and then, being "sums heretofore paid on account of the disposition of said lands," "shall be reimbursed the several appropriations out of which the same may have been paid, from the proceeds of the sale of said" lands.

The expenses which can be paid are the commissions of registers and receivers, expenses of depositing proceeds of sales, the proper proportion of salaries of registers and receivers, incidental expenses, clerk-hire, office rent, and contingencies. The receiver, as such, should be charged with the gross proceeds of sales, and, as disbursing agent, he should be credited with the payments he may make of expenses of sales as stated. The expenses as to each class of Osage lands should be separately stated, and proper statements made, in order that the "civilization fund" may be charged therewith. It will become necessary to dispose of the funds arising from sales and make up the proper accounts in accordance with the act of August 5, 1882, and also carry into effect the Osage treaty proclaimed January 21, 1867 (14 Stat., 687). See act of June 16, 1880 (21 Stat., 291.)*

The Secretary of the Treasury will be advised accordingly.

TREASURY DEPARTMENT,

First Comptroller's Office, December 30, 1882.

* A practice prevailed for a time of making sales of Indian lands by the sole authority of Indian treaties. The first speech ever made in Congress in opposition to this system and denying the validity of such sales, was made by William Lawrence, March 21, 1868. See Cong. Globe, vol. 80, part 3, 2d session, 40th Congress, 2065, 2684, May 29, 1868; 2814, June 3, 1868; 2894, June 5, 1868; *Id.*, vol. 87, 1st sess., 41st Congress, App. 166, March 19, 1869; *Id.*, vol. 89, part 2, 2d session, 41st Congress, 1579, February 25, 1870; *Id.*, 1070, March 3, 1870; *Id.*, vol. 93, part 6, 5137, July 21, 1870; *Id.*, vol. 95, part 1, 3d session, 41st Congress, 763, January 26, 1871; *Id.*, part 3, 1812, March 1, 1871; Cong. Record, vol. 2, part 5, 4693, June 5, 1874. This question was subsequently made the subject of judicial consideration. (*Holden v. Joy*, 17 Wall., 223;

Wood v. M., K., & T. Railway Co., 11 Kan., 323.) In these cases Mr. Lawrence was of counsel, and in the report of the former case, reference is made to "a copy of Mr. Lawrence's brief (152 pp., 8vo.) * * * in the Law Library of Congress, chapter 18, No. 2." This is referred to and quoted from in "Bishop on the Written Laws" (§ 14, *note*), and in "Bishop's Commentaries on the Law of Statutory Crimes" (1st ed., 14, *note*, also 2d ed.). And see *Indian Land Case* (2 Lawrence, Compt. Dec., 371); and *L., L., & G. R. R. Co. v. The United States* (92 U. S., 733). The full briefs in this latter case, making a good sized volume, will be found in the Congressional Law Library, chapter 18, sec. 2.

On the 27th of May, 1868, President Johnson made a treaty with the Osage Indians for the sale of the "diminished reserve," 8,003,203 acres, to the Leavenworth, Lawrence, and Galveston Railroad Company, at 19 cents an acre. This met with decided opposition from various sources, as may be seen from the debates in Congress, to which reference has been made. One result was that President Grant withdrew this and other similar treaties from the Senate, February 4, 1870. See Senate Journal, 2d session, 41st Congress, 1118; Cong. Globe, vol. 68, 2d session, 40th Congress, 3256, June 18, 1868, and 3278, June 19, 1868; House Ex. Doc., 179, 2d session, 41st Congress; letter of the Secretary of War, May 3, 1870; Cong. Globe, part 5, 2d session, 41st Congress, 4135, 4159; *Id.*, part 2, 2d session, 41st Congress, 1579; Senate Journal 12, 1st session, 41st Congress, March 6, 1869; *Id.*, 3d session, 40th Congress, 68, December 21, 1868; 171, February 1, 1869, and 381, March 2, 1869. The injunction of secrecy was never removed from the Senate proceedings on this treaty. The Congressional Globe shows how, and by whom, the attention of the House was first called to the treaty. The Senate of course never ratified it. December 4, 1871, President Grant, in his message to Congress, said: "I renew my recommendation that the public lands be regarded as a heritage, to be disposed of only as required for occupation, and to actual settlers."

Another result of the discussion of the subject was the enactment of that provision of the act of March 3, 1871 (16 Stat., 566, sec. 1; act June 22, 1874, 18 Stat., 176, sec. 3; act June 10, 1876, 19 Stat., 58; Rev. Stat., 2079), prohibiting Indian treaties; proposed treaties for the sale of lands were withdrawn by the President from the Senate; and others, doubtless, were not made, which would have been made but for the discussion of the subject. The final result has been, that immense tracts of lands have been subjected to the homestead policy, which would otherwise have been disposed of in large tracts for other purposes. Vast numbers of citizens have thus been enabled to secure homesteads, and share the benefits of this policy as a result of the labors of those who sustained it. There have been some interesting incidents connected with at least one of these treaties. See Cong. Record, Vol. 74, 1st session, 41st Congress, 568, April 6, 1869, and MS. letter of Hon. Cyril Hawkins, March 4, 1883.

In this connection, reference may be made to another feature of the homestead legislation. Under many acts of Congress, beginning with the act of September 20, 1850 (9 Stat., 466), immense tracts of land have been granted to, or in aid of, railroad companies, reserving to the United States alternate reserved sections within the limits of the grants, which could only be sold at the double minimum price of two dollars and fifty cents per acre. The original homestead act of May 20, 1862 (12 Stat., 392), as limited therein, and by the railroad grant acts, and other acts (act September 4, 1841, 5 Stat., 453; act March 3, 1853, 10 Stat., 244; act March 3, 1875, 18 Stat., 519; Rev. Stat., 2279), only authorized a homestead of eighty acres in these alternate reserved sections, and, as to citizens generally, this limit yet continues. At the second session of the Forty-first Congress, Mr. Lawrence introduced a bill, giving to "every private soldier and officer who * * * served in the army of the United States during the rebellion, for ninety days," the right "to enter one quarter section of land, * * * of the alternate reserved sections," within the limits of railroad land grants, as a homestead. This became a law, as section 25 of the act of July 15, 1870 (16 Stat., 320), re-enacted and modified by act of April 4, 1872 (17 Stat., 49), amended by act of June 8,

1872 (17 Stat., 333), and carried into the Revised Statutes as section 2304. A vast number of soldiers are indebted to the just and generous policy of these provisions for the liberal extent of homesteads they have been thereby enabled to secure.

The Osage Treaty, proclaimed January 21, 1867 (14 Stat., 687), provided for the survey and sale by the Secretary of the Interior of Osage lands therein mentioned. But Congress has regarded this as a mere contract, inoperative *per se*, and provision has been made by acts of Congress for the sale of the lands. (Act May 9, 1872, 17 Stat., 90, sec. 1; act June 23, 1874, 18 Stat., 283; act August 11, 1876, 19 Stat., 127; Rev. Stat., 2283, 2284, 2285.)

Provision was made for supplementing the Indian "*civilization fund*" by the first article of the treaty aforesaid, with the Great and Little Osage Indians (14 Stat., 687). This portion of the fund would have had no existence, but for an opinion given by Mr. Lawrence to the settlers on the Osage ceded lands, that they were not included in the railroad land grants made by the act of March 3, 1863 (12 Stat., 772), and July 26, 1866 (14 Stat., 289). This was contested before the Secretary of the Interior, Mr. Lawrence representing the settlers, and Hon. B. R. Curtis as counsel for the railroad companies claiming the lands. The Secretary decided in favor of the railroad companies, and patents were issued accordingly. The Attorney-General, subsequently, at the instance of citizens of Kansas, gave Mr. Lawrence, with such counsel as he might select, sole authority to commence and conduct judicial proceedings to cancel the patents. The result was that the patents were canceled by decrees of the Supreme Court of the United States. (*Leavenworth, Lawrence, and Galveston Railroad Co. v. United States*, 92 U. S., 733.)

The title to the Osage ceded lands was thus settled, and a large sum, already \$1,092,885.13, has been realized by the "*civilization fund*" from sales under the act of August 11, 1876 (19 Stat., 127). See act May 28, 1880, 21 Stat., 143; act June 16, 1880, 21 Stat., 291; act March 3, 1881, 21 Stat., 509: And see the opinions and arguments in relation to these lands in the volume above referred to. (Cong. Law Library, Chap. 18, section 2.) And see *Neer v. Williams* (27 Kan., 1), for a somewhat similar case. This large sum of money has, therefore, been indirectly saved to the Government; for, if the "*civilization fund*" had not thus been increased, an equal sum must have been appropriated from the Treasury for the support of Indians. In addition to this, the *whole* of these lands—960,000 acres—have been secured, at a nominal price, to actual settlers, who never could have thus acquired them but for the proceedings already mentioned. The volume to which reference is made above, fully shows how the entire body of lands were thus saved to the "*civilization fund*" and to actual settlers.

The "*Indian civilization fund*" was originated by "an act making provision for the civilization of the Indian tribes adjoining the frontier settlements, approved March 3, 1819 (3 Stats., p. 516)."

"Section 2 of this act provided for an annual appropriation of the sum of \$10,000 for civilization purposes, and [this sum] was carried on the books of the Treasury and this [Indian] department under the title of '*civilization of Indians*,' until 1873, when by an act approved February 14, 1873 (17 Stats., p. 461), so much of the act referred to as provided for an annual appropriation of \$10,000 was repealed."

"This fund was re-established under the title of '*civilization fund*' by the first article of the treaty with the Great and Little Osages, proclaimed January 21, 1867 (14 Stats., p. 687), which reads as follows:"

"The tribes of the Great and Little Osage Indians having now more lands than are necessary for their occupation, and all payments from the government to them under former treaties having ceased, leaving them greatly impoverished, and being desirous of improving their condition by disposing of their surplus lands, do hereby grant and sell to the United States the lands contained within the following boundaries: that is to say, beginning at the southeast corner of their present reservation and running thence north with the eastern boundary thereof fifty miles to the northeast corner; thence west with the northern line thirty miles; thence south fifty miles to the southern boundary of said reservation; and thence east with said southern boundary to

the place of beginning: *Provided*, That the western boundary of said lands herein ceded shall not extend further westward than upon a line commencing at a point on the southern boundary of said Osage country one mile east of the place where the Verdigris River crosses the southern boundary of the State of Kansas. And, in consideration of the grant and sale to them of the above-described lands, the United States agree to pay the sum of three hundred thousand dollars, which sum shall be placed to the credit of said tribe of Indians in the Treasury of the United States, and interest thereon at the rate of five per centum per annum shall be paid to said tribes semi-annually, in money, clothing, provisions, or such articles of utility as the Secretary of the Interior may from time to time direct. Said lands shall be surveyed and sold, under the direction of the Secretary of the Interior, on the most advantageous terms for cash, as public lands are surveyed and sold under existing laws, but no pre-emption claim or homestead settlement shall be recognized; and, after reimbursing the United States the cost of said survey and sale, and the said sum of three hundred thousand dollars placed to the credit of said Indians, the remaining proceeds of sales shall be placed in the Treasury of the United States to the credit of the 'civilization fund,' to be used, under the direction of the Secretary of the Interior, for the education and civilization of Indian tribes residing within the limits of the United States.'

"Under the provisions of this article of the treaty, Congress, by acts approved April 10, 1869, and July 15, 1870 (16 Stat., pp. 55 and 362), authorized the sale of the lands mentioned, the proceeds of which have been deposited in the Treasury to the credit of the 'civilization fund,' and disposed of as shown by detailed statement of receipts and disbursements" appended to Senate Executive Document No. 35, second session, Forty-seventh Congress, being letter from the Commissioner of Indian Affairs, November 23, 1882. The details prior to these will be found in the General Land Office, and in the Register's Office of the Treasury Department.

IN THE MATTER OF THE PAYMENT OF CLAIMS AND ALLOWANCES "GROWING OUT OF THE ILLNESS AND BURIAL OF THE LATE PRESIDENT, JAMES A. GARFIELD."—GARFIELD CASE.

1. The deficiency appropriation act of August 5, 1882 (22 Stat., 284, sec. 6), provides: "That a board of audit consisting of the First and Second Comptrollers of the Treasury and the Treasurer of the United States, is hereby constituted, to whom shall be referred all claims and the determination of all just and reasonable allowances to be made growing out of the illness and burial of the late President, James A. Garfield; that the said board shall hear, and examine, and determine all questions arising out of said claims and proposed allowances, and shall make an award in each case for services rendered, or supplies furnished, which, when received, shall be taken in full compensation of all demand whatsoever; that said board of audit shall issue a certificate, signed by each member of said board, setting forth the amount awarded to each person, and on account of what services rendered, or supplies furnished, and shall transmit said certificate to the Secretary of the Treasury, who shall cause to be paid to the several persons named therein, or their legal representatives, the amount so certified; and to enable the Secretary of the Treasury to pay said awards the sum of fifty-seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated; and of this amount not more than thirty-five thousand five hundred dollars in all shall be certified and paid for medical services and attendance; and in making said awards it shall be lawful for said board to make allowances to employees of the Government for extra services in amounts not exceeding three months of their current pay: *Provided*, That no claim shall be considered and no allowance shall be made by said board on or after January first, eighteen hundred and eighty-three: *And provided further*, That the aggregate amount of awards made by said board shall not exceed the amount hereby appropriated: *And pro-*

vided further, That no claim shall be considered under this section unless the person filing the same shall file a release under seal of all claims against the representatives of the late President growing out of said illness and burial." *Held*: (1) That the statutory provisions, which require claims to be examined by an Auditor, and by him reported to a Comptroller, in order that such Comptroller may certify a balance due, and that a Treasury warrant may issue for the payment of such balance, are applicable to the awards made under the act of August 5, 1882. (2) That a certificate of said awards is to be transmitted by the board of audit to the Secretary of the Treasury, and by him to the First Auditor for his report thereon to the First Comptroller, in order that a balance may be certified to the respective claimants, who are to be paid by a Treasury warrant issued in their favor; and that all said awards may be included in one warrant. (3) That the certificate of awards, made under the act of August 5, 1882, is, at least, *prima facie*, conclusive on the accounting officers.

2. The modes stated, by which the awards can be paid.

August 30, 1882, the following circular was issued, and soon after transmitted to all persons supposed to be claimants under the same, to wit:

REGULATIONS.

Claims growing out of the illness and burial of the late President, James A. Garfield.

The statute relating to the claims above named is as follows:

[PUBLIC—No. 205.]

AN ACT making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with section four of the act of June fourteenth, eighteen hundred and seventy-eight, heretofore paid from permanent appropriations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby appropriated, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter stated, namely:

* * * * *

SEC. 6. That a board of audit consisting of the First and Second Comptrollers of the Treasury and the Treasurer of the United States, is hereby constituted, to whom shall be referred all claims and the determination of all just and reasonable allowances to be made growing out of the illness and burial of the late President, James A. Garfield; that the said board shall hear, and examine, and determine all questions arising out of said claims and proposed allowances, and shall make an award in each case for services rendered, or supplies furnished, which, when received, shall be taken in full compensation of all demand whatsoever; that said board of audit shall issue a certificate, signed by each member of said board, setting forth the amount awarded to each person, and on account of what services rendered, or supplies furnished, and shall transmit said certificate to the Secretary of the Treasury, who shall cause to be paid to the several persons named therein, or their legal representatives, the amount so certified; and to enable the Secretary of the Treasury to pay said awards the sum of fifty-seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby

appropriated; and of this amount not more than thirty-five thousand five hundred dollars in all shall be certified and paid for medical services and attendance; and in making said awards it shall be lawful for said board to make allowances to employees of the Government for extra services in amounts not exceeding three months of their current pay: *Provided*, That no claim shall be considered and no allowance shall be made by said board on or after January first, eighteen hundred and eighty-three: *And provided further*, That the aggregate amount of awards made by said board shall not exceed the amount hereby appropriated: *And provided further*, That no claim shall be considered under this section unless the person filing the same shall file a release under seal of all claims against the representatives of the late President growing out of said illness and burial.

Approved, August 5, 1882.

The following forms and instructions are submitted for the use of claimants under the foregoing statute:

Form of account for professional or personal services and supplies furnished.

THE ESTATE OF JAMES A. GARFIELD, *late President of the United States*, to JOHN SMITH, DR.

[Here describe fully the services rendered, giving in detail the time occupied, the kind of service, by whose direction, authority, or employment, and all particulars necessary to a correct understanding of the claim, with the requisite facts to show its validity as a claim, and the amount which should be paid. This is a requirement of the law—not a regulation of the Board of Audit.

Public accounts must show a "statement of items," (*Watkins vs. United States*, 9 Wall., 764;) "vouchers" must be submitted with the account or claim "to the accounting officers," (*Id.*;) for without such evidences before the accounting officers there could not be any *intelligent scrutiny of the claim*, nor any decision which would be satisfactory to the claimant or to the public. (*Id.*)

Form of oath to be annexed to a claim.

UNITED STATES OF AMERICA,

District of Columbia, City and County of Washington, ss:

I, John Smith, being duly sworn, on oath say that I am owner of the foregoing claim against the estate of James A. Garfield, deceased, late President of the United States; that said claim is justly due to me from said estate and the legal representatives of said deceased; that no payment or payments have been made thereon, and that there are no offsets or offset or counter-claim against the same to the knowledge or belief of this affiant; that the services [supplies] therein mentioned were rendered [furnished] and the charges therefor as therein stated are reasonable and just; [that the expenses as therein charged were actually incurred and paid at the dates specified, and the amounts paid, as therein stated, were the actual, reasonable, and necessary amounts therefor, and the usual amounts for similar items of expense;] that the facts stated and allegations made in the foregoing claim and statements therein are true; that the PERSONAL SERVICES [supplies furnished] for which said claim is made were rendered [furnished] by affiant at the request of _____, and under the direction of _____ and

at ———, and were rendered necessary by the illness [or burial] of the late President, James A. Garfield, and were rendered [or furnished] in consequence thereof [and the prices charged in said claim for the articles of supplies therein mentioned were the ordinary, reasonable, and usual prices for such articles]; that this affidavit is made for the purpose of verifying said claim and of securing to this affiant the benefit of the provisions of section six of the act of Congress approved August 5, 1882, known as the Deficiency Appropriation Act, and for the purpose of presenting said claim to the board of audit constituted by said section as a claim against the United States, and for the purpose of releasing all claims against the representatives of the late President, James A. Garfield.

—————.

Sworn to by said ———, before me, and by him subscribed in my presence, this ——— day of ———, 1882.

—————.

[Official signature and seal.]

When the claim is for "services rendered," the words in brackets in the foregoing form—[*supplies*] and [*furnished*]*—*may be omitted.

When the claim is for "supplies furnished," the words "*services rendered*" may be omitted.

It will be well to have all claims carefully prepared, to avoid delay, which might be occasioned if corrections should be required.

When there are *no items of expense*, the clause in relation to that subject may be omitted. The clause in the foregoing form "that the personal services for which said claim is made were rendered by affiant at the request of," &c., is not requisite as to medical and surgical services.

Form of release to be annexed to the foregoing form.

UNITED STATES OF AMERICA,

District of Columbia, City and County of Washington, ss:

Whereas the sixth section of the act of Congress approved August 5, 1882, known as the Deficiency Appropriation Act, constitutes a board of audit to whom shall be referred all claims, and the determination of all just and reasonable allowances to be made, growing out of the illness and burial of the late President of the United States, James A. Garfield; and whereas said section of said act authorizes said board to hear, examine, and determine all questions arising out of said claims and proposed allowances, and to make an award in each case for services rendered or supplies furnished, which, when received, shall be taken in full compensation of all demands whatsoever; and whereas the foregoing claim for ——— dollars in my favor is now by me presented to said board of audit under and by virtue of said section, and for the purpose of securing to me the benefit thereof as therein authorized, and subject to the provisions and conditions of said act, and for the purpose of accepting the award therein authorized to be made: Now, therefore, in consideration of the premises, and of the benefit to me accruing by reason thereof, I hereby release all claims against the representatives of the late President, James A. Garfield, growing out of said illness and burial above mentioned.

In testimony whereof I hereto subscribe my name and affix my seal
this _____ day of _____, A. D. 1882.

_____. [Seal of wax or wafer.]

Executed in presence of us—

_____.
_____.

[Witnesses.]

Claims may be filed with either member of the board of audit. The board will require such evidence in support of claims as may be deemed necessary and proper.

WILLIAM LAWRENCE,
First Comptroller.

W. W. UPTON,
Second Comptroller.

JAS. GILFILLAN,
Treasurer of the United States.

TREASURY DEPARTMENT,
Washington City, August 30, 1882.

Questions arose under this circular, and the statute therein mentioned, relative to the consideration of claims and the form of certificate of awards in favor of claimants. The board of audit determined that its duties and modes of procedure were not, technically, those pertaining to arbitrators, but, rather, in the character of auditors, charged with the duty of determining the "just and reasonable allowances to be made growing out of the illness and burial of the late President, James A. Garfield"; and that it was its further duty to "hear, and examine, and determine all questions arising out of said * * * proposed allowances," and to "make an award in each case." Each claimant had a right to present such evidence as he deemed proper, to inspect any other evidence furnished to or procured by the board, and to be heard on application by himself, or attorney, in support of his claim. No notice was required to be given to the claimants of the time, or place, when the board would examine the evidence, or proceed to consider the same and make an award.

Claims having been presented with evidence, and other proofs in some cases having been otherwise furnished, the board examined the same, and passed on each claim separately. The board determined that the statute contemplated that only one certificate containing the awards in favor of the respective claimants be made to the Secretary of the Treasury. The act says that the board "shall issue a certificate, * * * and shall transmit *said certificate* to the Secretary of the Treasury, who shall cause to be paid to the *several persons named therein* or their legal representatives, the amount so certified." This implies that one certificate is to be made. On this subject the statute, however, is directory, and several certificates would be equally valid as one. If, after one certificate, embracing all claims allowed, shall have been delivered to the Secretary of the Treasury, other claims should be presented to

the board of audit prior to January 1, 1883, they may be considered and decided.

December 11, 1882, the board of audit made a certificate of awards, which on the 12th of December, 1882, was transmitted to the Secretary of the Treasury.*

The letter transmitting the certificate of awards to the Secretary stated that, after January 1, 1883, the original claims, the evidence in support thereof, and all papers relating thereto, would be transmitted to the Register of the Treasury Department, to be filed in his office.†

There are two modes in which payments may be made to the respective claimants. The Secretary of the Treasury may appoint a special disbursing agent, who, after giving bond, can make a requisition for the proper amount of money, can make payment on proper vouchers, and can have his account of money received and disbursed settled through the First Auditor and First Comptroller. The more usual mode is for the Secretary to transmit the certificate of awards to the First Auditor, in order that said auditor may state an account in favor of each claimant, and make a report thereof to the First Comptroller, who would then certify a balance in favor of each claimant, on which certificate a Treasury warrant, signed by the Secretary and countersigned by the First Comptroller, would issue, and payment be made accordingly.

Section 236 of the Revised Statutes declares that all claims in which the United States is concerned "shall be settled and adjusted in the Department of the Treasury." Other sections of the Revised Statutes require claims to be examined by an auditor, and by him reported to a comptroller, in order that such comptroller may certify the balance arising thereon, to be paid by a Treasury warrant, issued by the Secretary of the Treasury, and countersigned by the First Comptroller.

The act of August 5, 1882, requires the Secretary of the Treasury to "cause to be paid to the several persons named [in the certificate of awards] * * * or their legal representatives, the amount so certified." Payments may be made in either of the modes stated. (See Rev. Stat., 236, 248, 269, 277, 305.) These provisions of the Revised Statutes are, by their terms, applicable to claims under the act of August 5, 1882, which act does not repeal or suspend said provisions, even as to claims made under it, nor except such claims from their operation. The Treasurer of the United States can only disburse public money "upon warrants." (Rev. Stat., 305.) A warrant, however, in favor of a special disbursing agent would authorize an advance of money to his credit to pay the claims. It has been repeatedly decided that the First Auditor has juris-

* For the certificate of awards and other papers relating to the claims presented to the Board of Audit, and to their proceedings, see House Miscellaneous Doc. No. 14, 2d session 47th Congress, January 3, 1883, foot-note, end of this case.

The House Report No. 1069, 1st session 47th Congress, made by Mr. Taylor, April 19, 1882, has appended to it a schedule of the claims passed by the select committee to audit the expenses of the late President James A. Garfield's illness and burial.

† They were transmitted to the Register by letter January 2, 1883.

diction of all claims not specifically assigned to any other auditor. The certificate of awards, made under the act of August 5, 1882, is, at least *prima facie*, conclusive on the accounting officers and Secretary of the Treasury.

December 13, 1882, the Secretary of the Treasury referred the certificate of awards in this case to the First Auditor "for proper disposition."

December 14, 1882, the First Auditor, by his report, No. 234094, to the First Comptroller, certified that he had "examined and adjusted an account between the United States and the parties" thereafter named, and "finds that there is due to" said persons respectively the amounts therein stated, all of which are as in the certificate of awards, and amount to \$39,793.01.

December 15, 1882, on this report, the First Comptroller certified a balance due said claimants, respectively, as in the report, and transmitted to the Register the papers accompanying the Auditor's report, to wit: his report, the certified balance, the certificate of awards, the letter of the First Comptroller to the Secretary, dated December 12, 1882, transmitting to him the certificate of awards, and the reference made by the Secretary of said letter and certificate to the First Auditor.

December 19, 1882, the House of Representatives adopted a resolution instructing the board of audit to report to the House "a schedule of all the claims presented to said board, the action of the board upon the same, the allowances made, and generally all their transactions in the premises," and said board thereupon made a report and transmitted it to the Speaker of the House of Representatives.*

* The report of the board of audit, House Mis. Doc. No. 14, 2d session 47th Congress, is as follows:

EXPENSES OF PRESIDENT GARFIELD'S ILLNESS AND DEATH.

Letter from the First Comptroller of the Treasury, transmitting report of the board to audit the expenses of the sickness and death of the late President Garfield.

JANUARY 3, 1883.—Referred to the Select Committee to audit expenses of the late President James A. Garfield's illness and burial, and ordered to be printed.

TREASURY DEPARTMENT,
Washington, D. C., January 2, 1883.

SIR: The board of audit constituted by the sixth section of the act of Congress approved August 5, 1882, known as the deficiency appropriation act, have the honor to acknowledge the receipt from Hon. Edward McPherson, Clerk of the House of Representatives, of a resolution adopted by that body on the 19th of December, 1882, as follows:

"Resolved, That the board heretofore appointed to audit the expenses attendant upon the last sickness and death of Hon. James A. Garfield, late President of the United States, are hereby instructed to report to this House a schedule of all the claims presented to said board, the action of the board upon the same, the allowances made, and generally all their transactions in the premises."

And in answer thereto state that the schedule hereto annexed, marked A, shows all the claims presented to said board, the action of the board upon the same, and the allowances made.

The board met at the Treasury Department August 30, 1882, and issued a circular, a copy of which was transmitted to all persons known or supposed to have claims under the act referred to, and a copy of which is hereto annexed, marked B.

On the 11th day of November, 1882, the board met and proceeded to hear and examine all claims presented to that date, and adjourned from day to day until the 11th day of December following, at which time they determined all questions arising out of all claims presented and all proposed allowances for services rendered and supplies furnished, and made their award and issued their certificate signed by each member of said board, setting forth the amount awarded to each person, and on what account the services were rendered or supplies furnished, and on the 12th day of December transmitted said award and certificate to the Hon. Charles J. Folger, Secretary of the Treasury, a copy of which is hereto annexed, marked C.

Since the making of said award, the following claims, mentioned in said Schedule A, have been filed and have not been allowed, to wit:

Claim of Shoomaker & Hertzog, Washington, D. C. (by William Shoomaker, surviving partner), for wines furnished for use of the late President during his last illness.....	\$16 00
Claim of F. M. McMillan, of Milton-on-Hudson, New York, for services as engineer and expert in designing and superintending the construction of the refrigerating apparatus used at the Executive Mansion during the illness of the late President.....	450 00
Claim of Samuel H. Sentenne, assistant engineer Navy Department building, for extra services as machinist at the Executive Mansion in connection with the cooling apparatus used during the illness of the late President	200 00
Claim of William M. Ellis, laborer in Navy Department, for extra services rendered at the Executive Mansion and elsewhere, during the illness of the late President, independent of claimant's regular duties in the Navy Department. (No amount claimed.)	
Claim of Thomas E. Lynch, late machinist in the Washington navy-yard, for extra services at the Executive Mansion in connection with the cooling apparatus used during the late President's illness.....	156 00
Claim of Robert Harris, assistant messenger in the Interior Department, for extra services at the Executive Mansion, and elsewhere, as driver, during the late President's illness, outside of claimant's regular duties in the Interior Department	150 00
Claim of Edwin Hodge, laborer in Post-Office Department, for extra services at the Executive Mansion and elsewhere, as driver, during the late President's illness, outside of claimant's regular hours in Post-Office Department.	100 00
Claim of Joshua McNeal, police officer (Metropolitan police), for extra services at Executive Mansion grounds, during the illness of the late President.....	225 00
Claim of William Cunningham, mounted policeman (Metropolitan force), for extra services at Executive Mansion grounds during the late President's illness	165 00
Claim of Charles Kerby, mounted policeman (Metropolitan police), for extra services at Executive Mansion grounds during the late President's illness..	165 00
Claim of William W. Perry, sergeant Metropolitan police, for extra and special duty at Executive Mansion grounds during the late President's illness.	
Claim for ——— dollars.	

All the claims presented and the papers relating thereto have been transmitted to the Register of the Treasury, to be filed in his office.

I have the honor to be, very respectfully,

WILLIAM LAWRENCE,
President Board of Audit.

HON. J. WARREN KEIFER,
Speaker of the House of Representatives United States.

A.

Schedule of claims growing out of the illness and burial of the late President James A. Garfield, presented to the board of audit constituted by section 6 of the act of Congress approved August 5, 1852, known as the deficiency appropriation act; showing the names and residences of the respective claimants, the character of their several claims, the amounts claimed by them respectively, the amounts awarded and certified for payment by the board of audit, and also the claims that have been disallowed by the board.

MEDICAL SERVICES AND ATTENDANCE.

Names of claimants.	Residence of claimants.	Character of claims presented	Amounts claimed.	Amounts awarded.
D. W. Bliss, M. D.	Washington, D. C.	For professional services as physician and surgeon-in-chief, and for superintending autopsy at Elberon, N. J.	\$25,000 00	96,500 00
D. Hayes Agnew, M. D.	Philadelphia, Pa.	For professional services as consulting surgeon	14,700 00	5,000 00
Frank H. Hamilton, M. D.	New York City	For professional services as consulting surgeon and physician	25,000 00	5,000 00
Robert Heyburn, M. D.	Washington, D. C.	For professional services as consulting physician and surgeon	10,800 00	4,000 00
Miles A. Beyston, M. D.	Cleveland, O.	For professional services as consulting physician	4,500 00	4,000 00
Susan A. Edson, M. D.	Washington, D. C.	For skillful attendance on professional capacity, as physician	10,000 00	3,000 00
D. S. Lamb, M. D. (surgeon United States Army).	do	For making post-mortem examination at Elberon, N. J.	1,000 00	Disallowed.
Total amount awarded for medical services and attendance			.....	27,500 00

SERVICES RENDERED AND SUPPLIES FURNISHED OF A MISCELLANEOUS CHARACTER.

James W. Walsh	New York City	For services rendered and expenses incurred in embalming body of the late President.	500 00	75 00
Charles A. Benedict	do	For services rendered, supplies furnished, and expenses incurred as undertaker	887 50	700 00
Henry S. Little (receiver of the Central Railroad Company of New Jersey).	do	For services and expenses in laying special track at Elberon, N. J., for use of same, and for running special trains from Jersey City to Elberon, N. J., and return.	2,220 91	1,500 00
C. T. Jones	Elberon, N. J.	For board, lodging and attendance for Mrs. Garfield and the suite of the late President at Elberon, N. J.	1,102 75	1,102 75
George W. Knox (Knox Express)	Washington, D. C.	For transportation of baggage from various points to the Baltimore and Potomac Railroad depot	13 00	13 00
R. E. Kaphenathin	do	For prescriptions filled and druggists' supplies furnished	390 25	250 00
G. C. Shinn	do	do	78 85	78 85
W. S. Thompson	do	For druggists' supplies furnished	13 16	13 16
George Thompson & Co.	do	do	86 27	86 27
Charles Fischer	New York City	For surgical supplies furnished	101 12	100 12
White & Overman	Washington, D. C.	For gratinade from trough furnished for use in cooling late President's room	18 80	18 00
Independent Ice Company (C. H. Church, president).	do	For ice furnished at the Executive Mansion	1,510 02	1,178 00
M. Church & Barker	do	For chamber furniture supplied at the Executive Mansion	102 55	102 55
For carpet flannel and flooring furnished at the Executive Mansion	do		122 44	122 44

House, Brother & Co.	For larches furnished for use in connection with the illness of the late President	4 00	4 00
Louis H. Schneider	For articles of hardware furnished at the Executive Mansion	7 50	7 50
W. B. Moers & Son	For material and labor in draping the private residence of the late President, and for one pillow furnished	40 35	40 35
The National Capital Telephone Company	For rental of instruments and exchange service, in the physicians' and engineer's rooms, at the Executive Mansion	50 00	50 00
R. L. Cranford	For a truck in sprinkling the grounds of the Executive Mansion	270 00	270 00
Ralph S. Jennings	For services and expenses in connection with the cooling apparatus at the Executive Mansion	6,154 06	6,154 06
Schoemaker & Hertzog	For whips furnished for use of the late President during his last illness	18 00	(*)
F. M. McMillan	For services as engineer and expert in designing and superintending construction of the refrigerating apparatus used at the Executive Mansion	450 00	(*)
W. R. Shurtz	For services rendered in furnishing, and expenses incurred as undertaker, for one invalid bed delivered at the Executive Mansion	1,800 50	(*)
James Goodwin	For one invalid bed delivered at the Executive Mansion	75 00	(*)
Henry H. Grant	For telegraph service at Elmhurst, N. J. rendered as operator of the Western Union Telegraph Company	100 00	(*)

Total amount awarded for services and supplies of a miscellaneous character

6,853 01

ALLOWANCES TO EMPLOYÉS OF THE GOVERNMENT FOR EXTRA SERVICES.

Names of claimants.	Occupation.	Pay per annum.	Character of claims presented.	Amounts claimed.	Amounts awarded.
William T. Crump	Late steward at Executive Mansion	\$1,800 00	For extra services as steward and as nurse at Executive Mansion	.....	\$300 00
O. L. Pruden	Assistant secretary at Executive Mansion	2,250 00	For extra services as assistant secretary at Executive Mansion	.....	200 00
William H. Crook	Executive clerk at Executive Mansion	2,000 00	For extra services as executive clerk at Executive Mansion	.....	200 00
Charles M. Hendley	do	2,000 00	do	.....	200 00
Warren S. Young	Clerk at Executive Mansion	1,800 00	For extra services as clerk at Executive Mansion	.....	200 00
Henry C. Morton	do	1,800 00	do	.....	200 00
E. S. Deamore	Sergeant police at Executive Mansion	1,140 00	For extra services as sergeant police at Executive Mansion	.....	200 00
J. T. Atchison	Police officer at Executive Mansion	1,080 00	For extra services as police officer at Executive Mansion	.....	200 00
O. L. Judd	Telegraph operator at Executive Mansion	1,400 00	For extra services as telegraph operator at Executive Mansion	.....	150 00
Joseph S. Bolway	Clerk at Executive Mansion	1,400 00	For extra services as clerk at Executive Mansion	.....	150 00
Charles Goodwin	Doorkeeper at Executive Mansion	1,400 00	For extra services as doorkeeper at Executive Mansion	.....	150 00
Daniel Sprigg	Body servant at Executive Mansion	600 00	For extra services as body servant to the late President, and as nurse	.....	150 00
Isiah Lauckner	Waiter at Executive Mansion	600 00	For extra services as waiter and as nurse to the late President	.....	150 00
J. T. Richard	Doorkeeper at Executive Mansion	1,200 00	For extra services as doorkeeper at Executive Mansion	.....	150 00
A. C. Smith	do	1,200 00	do	.....	150 00
Charles H. Lamon	Clerk in Treasury Department	1,400 00	For extra services at Executive Mansion, outside of his official duties as clerk in the Treasury Department	.....	150 00

* Release not filed in time. See foregoing letter to Speaker House of Representatives. † See foregoing letter to Speaker House of Representatives.

† No release; claim not considered.

‡ Disallowed.

ALLOWANCES TO EMPLOYEES OF THE GOVERNMENT FOR EXTRA SERVICES—Continued.

Names of claimants.	Occupation.	Pay per annum.	Character of claims presented.	Amounts claimed.	Amounts awarded.
George W. Constantine.....	Machinist, United States Navy.....	p. d. \$3 75	For extra services as machinist, United States Navy, rendered at Executive Mansion in connection with cooling apparatus.....	\$150 00	150 00
B. F. Montgomery.....	Telegraph operator at Executive Mansion.....	1,200 00	For extra services as telegraph operator at Executive Mansion.....	.....	125 00
Walter E. Duffe.....	Clerk at Executive Mansion.....	1,200 00	For extra services as clerk at Executive Mansion.....	.....	125 00
William D. Allen.....	Doorkeeper at Executive Mansion.....	1,200 00	For extra services as usher at Executive Mansion.....	.....	100 00
A. T. Dorn.....	Doorkeeper at Executive Mansion.....	1,200 00	For extra services as doorkeeper at Executive Mansion.....	.....	100 00
Thomas Dolan.....	Messenger at Executive Mansion.....	1,200 00	For extra services as mounted messenger at Executive Mansion.....	300 00	100 00
James Sheridan.....	do.....	1,200 00	do.....	300 00	100 00
Edgar E. Beckley.....	do.....	1,200 00	For extra services as messenger at Executive Mansion.....	.....	100 00
Arthur Simmons.....	do.....	1,200 00	do.....	.....	100 00
William H. Bailey.....	do.....	540 00	For extra services as messenger at Executive Mansion.....	300 00	100 00
John F. Gay.....	do.....	1,200 00	For extra services at Executive Mansion as employe of War Department, specially detailed.....	300 00	100 00
William H. Du Bois.....	Lieutenant of police at Executive Mansion grounds.....	1,000 00	For extra services as police officer at Executive Mansion.....	.....	100 00
William S. Lewis.....	Police officer at Executive Mansion.....	1,000 00	For extra services as lieutenant of police at Executive Mansion.....	.....	100 00
Thomas S. Herbert.....	do.....	1,854 00	For extra services as fireman at Executive Mansion in connection with cooling apparatus.....	.....	75 00
Beverly R. Leves.....	Waiter at Executive Mansion.....	600 00	For extra services as waiter at Executive Mansion.....	.....	75 00
Jeremiah Smith.....	Housekeeper at Executive Mansion.....	600 00	For extra services as house-keeper at Executive Mansion.....	.....	75 00
Abraham W. Dyson.....	Messenger in Treasury Department.....	840 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the War Department.....	180 00	75 00
Fred. R. Moore.....	do.....	840 00	do.....	.....	75 00
William S. Dupes.....	Messenger in War Department.....	840 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the War Department.....	175 00	75 00
Charles H. Lee.....	Messenger in Department of Justice.....	840 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the War Department.....	210 00	75 00
William Gwin.....	Messenger in Department of State.....	840 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the War Department.....	168 86	75 00
Mary White.....	Laundress at Executive Mansion.....	p. m. 20 00	For extra services as laundress at Executive Mansion.....	.....	75 00
Ella White.....	do.....	p. m. 20 00	For extra services as laundress at Executive Mansion.....	.....	60 00
William S. Crawford.....	Driver of steward's wagon at Executive Mansion.....	p. m. 20 00	For extra services as driver of steward's wagon at Executive Mansion.....	.....	50 00
Samuel H. Collins.....	Police officer at Executive Mansion.....	1,000 00	For extra services as police officer at Executive Mansion.....	.....	50 00
Washington Jones.....	Watchman at Executive Mansion.....	p. m. 55 00	For extra services as watchman at Executive Mansion.....	.....	50 00
William Anderson.....	Laborer at Executive Mansion.....	p. m. 100 00	For extra services as laborer at Executive Mansion.....	.....	50 00
Henry Pfister.....	Head gardener at Executive Mansion.....	p. d. 2 00	For extra services as head gardener at Executive Mansion.....	150 00	20 00
James Wilson.....	Waiter at Executive Mansion.....	p. d. 2 00	For extra services as waiter at Executive Mansion.....	.....	20 00
George Anderson.....	Cookman at Executive Mansion.....	p. m. 25 00	For extra services as cookman at Executive Mansion.....	.....	20 00
James A. Watt.....	Assistant gardener at Executive Mansion.....	p. m. 65 00	For extra services as assistant gardener at Executive Mansion.....	.....	20 00
Noel Sheridan.....	Gardener at Executive Mansion.....	p. m. 15 00	For extra services as gardener at Executive Mansion.....	.....	20 00
Margaret Nugent.....	Cook at Executive Mansion.....	p. d. 1 00	For extra services as cook at Executive Mansion.....	80 00	20 00
William Willis.....	Hostler at Executive Mansion.....	p. m. 50 00	For extra services as hostler at Executive Mansion.....	.....	10 00
James Simons.....	do.....	p. m. 50 00	For extra services as hostler at Executive Mansion.....	.....	10 00

William Tillet.....	For extra services as laborer at Executive Mansion.....	p. d. 1 25	18 00
Charles Gottschalk.....	do.....	p. d. 1 25	18 00
Arnold Fry.....	do.....	p. m. 45 00	18 00
Patrick Donnelly.....	do.....	p. d. 1 25	18 00
Isaac Pearson.....	Sergeant police at Executive Mansion grounds.....	p. d. 1 40 00	(*)
James A. D. Green.....	Assistant messenger War Department.....	720 00	(*)
William J. Lee.....	Messenger War Department.....	(†)	(*)
Samuel H. Bentzen.....	Assistant engineer Navy Department building.....	1,000 00	(*)
William M. Ellis.....	Laborer Navy Department.....	600 00	
Thomas E. Lynch.....	Machinist, United States navy-yard, Washington.....	p. d. 3 00	(*)
Robert Harris.....	Assistant messenger, Interior Department.....	720 00	(*)
Edwin Hodge.....	Laborer in Post-Office Department.....	600 00	(*)
Joshua McNeal.....	Police officer at Executive Mansion grounds.....	900 00	(*)
William Cunningham.....	do.....	1,600 00	(*)
Charles Kerby.....	do.....	900 00	(*)
William W. Perry.....	Sergeant police at Executive Mansion grounds.....	1,140 00	(*)
Total amount awarded as allowances to employes of the government for extra services.....			5,440 00

* Disallowed.

† Pay and allowances prescribed by law.

: See foregoing letter to Speaker House of Representatives.

RECAPITULATION.

Total amount awarded for medical services and attendances.....	\$77,500 00
Total amount awarded for services and supplies of a miscellaneous character.....	4,553 01
Total amount awarded for allowances to employes of the government for extra services.....	5,440 00
Total amount awarded and certified for payment December 11, 1882, on all claims presented, growing out of the illness and burial of the late President James A. Garfield.....	30,793 01

B.

REGULATIONS.

Claims growing out of the illness and burial of the late President James A. Garfield.

The statute relating to the claims above named is as follows:

[PUBLIC—No. 205.]

AN ACT making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with section four of the act of June fourteenth, eighteen hundred and seventy-eight, heretofore paid from permanent appropriations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, out of any money in the Treasury not otherwise appropriated, for the objects hereinafter stated, namely:

* * * * *

SEC. 6. That the board of audit, consisting of the First and Second Comptrollers of the Treasury and the Treasurer of the United States, is hereby constituted, to whom shall be referred all claims and the determination of all just and reasonable allowances to be made growing out of the illness and burial of the late President James A. Garfield; that the said board shall hear, and examine, and determine all questions arising out of said claims and proposed allowances, and shall make an award in each case for services rendered, or supplies furnished, which, when received, shall be taken in full compensation of all demand whatsoever; that said board of audit shall issue a certificate, signed by each member of said board, setting forth the amount awarded to each person, and on account of what services rendered, or supplies furnished, and shall transmit said certificate to the Secretary of the Treasury, who shall cause to be paid to the several persons named therein, or their legal representatives, the amount so certified; and to enable the Secretary of the Treasury to pay said awards the sum of fifty-seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated; and of this amount not more than thirty-five thousand five hundred dollars in all shall be certified and paid for medical services and attendance; and in making said awards it shall be lawful for said board to make allowances to employes of the government for extra services in amounts not exceeding three months of their current pay: *Provided*, That no claim shall be considered and no allowance shall be made by said board on or after January first, eighteen hundred and eighty-three: *And provided further*, That the aggregate amount of awards made by said board shall not exceed the amount hereby appropriated: *And provided further*, That no claim shall be considered under this section unless the person filing the same shall file a release under seal of all claims against the representatives of the late President growing out of said illness and burial.

Approved, August 5, 1882.

The following forms and instructions are submitted for the use of claimants under the foregoing statute:

Form of account for professional or personal services and supplies furnished.

The estate of James A. Garfield, late President of the United States, to John Smith, Dr.

[Here describe fully the services rendered, giving in detail the time occupied, the kind of service, by whose direction, authority, or employment, and all particulars necessary to a correct understanding of the claim, with the requisite facts to show its validity as a claim, and the amount which should be paid. This is a requirement of the law—not a regulation of the board of audit.

Public accounts must show a "statement of items" (Watkins vs. United States, 9 Wall., 764); "vouchers" must be submitted with the account or claim "to the accounting officers" (*Id.*); for "without such evidences before the accounting officers there could not be any intelligent scrutiny of the claim, nor any decision which would be satisfactory to the claimant or to the public" (*Id.*).]

Form of oath to be annexed to a claim.

UNITED STATES OF AMERICA,

District of Columbia, City and County of Washington, ss :

I, John Smith, being duly sworn, on oath say that I am owner of the foregoing claim against the estate of James A. Garfield, deceased, late President of the United States; that said claim is justly due to me from said estate and the legal representatives of said deceased; that no payment or payments have been made thereon, and that there are no offsets or offset or counterclaim against the same to the knowledge or belief of this affiant; that the services [supplies] therein mentioned were rendered [furnished] and the charges therefor as therein stated are reasonable and just [that the expenses as therein charged were actually incurred and paid at the dates specified, and the amounts paid, as therein stated, were the actual, reasonable, and necessary amounts therefor, and the usual amounts for similar items of expense]; that the facts stated and allegations made in the foregoing claim and statements therein are true; that the personal services [supplies furnished] for which said claim is made were rendered [furnished] by affiant at the request of _____, and under the direction of _____ and at _____, and were rendered necessary by the illness [or burial] of the late President James A. Garfield, and were rendered [or furnished] in consequence thereof [and the prices charged in said claim for the articles of supplies therein mentioned were the ordinary, reasonable, and usual prices for such articles]; that this affidavit made for the purpose of verifying said claim and of securing to this affiant the benefit of the provisions of section six of the act of Congress approved August 5, 1882, known as the Deficiency Appropriation Act, and for the purpose of presenting said claim to the board of audit constituted by said section as a claim against the United States, and for the purpose of releasing all claims against the representatives of the late President James A. Garfield.

Sworn to by said _____, before me, and by him subscribed in my presence, this _____ day of _____, 1882.

_____.
[Official signature and seal.]

When the claim is for "services rendered," the words in brackets in the foregoing form [supplies] and [furnished] may be omitted.

When the claim is for "supplies furnished," the words "services rendered" may be omitted.

It is well to have all claims carefully prepared, to avoid delay, which might be occasioned if corrections should be required.

When there are *no items of expense*, the clause in relation to that subject may be omitted. The clause in the foregoing form "that the personal services for which said claim is made were rendered by affiant at the request of," &c., is not requisite as to medical and surgical services.

Form of release to be annexed to the foregoing form.

UNITED STATES OF AMERICA,

District of Columbia, City and County of Washington, ss :

Whereas the sixth section of the act of Congress approved August 5, 1882, known as the Deficiency Appropriation Act, constitutes a board of audit to whom shall be referred all claims, and the determination of all just and reasonable allowances to be made, growing out of the illness and burial of the late President of the United States, James A. Garfield; and whereas said section of said act authorizes said board to hear, examine, and determine all questions arising out of said claims and proposed allowances, and to make an award in each case for services rendered or supplies furnished; which, when received, shall be taken in full compensation of all demands whatsoever; and whereas the foregoing claim for _____ dollars in my favor is now by me presented to said board of audit under and by virtue of said section, and for the purpose of securing to me the benefit thereof as therein authorized, and subject to the provisions and conditions of said act, and for the purpose of accepting the award therein authorized to be made: Now, therefore, in consideration of the premises, and of the benefit to me accruing by reason thereof, I hereby release all claims against the representatives of the late President James A. Garfield, growing out of said illness and burial above mentioned.

In testimony whereof, I hereto subscribe my name and affix my seal this _____ day of _____, A. D. 1882.

_____. [Seal of wax or wafer.]

Executed in the presence of us—

_____.

[Witnesses.]

Claims may be filed with either member of the board of audit. The board will require such evidence in support of claims as may be deemed necessary and proper.

WILLIAM LAWRENCE,
First Comptroller.

W. W. UPTON,
Second Comptroller.

JAS. GILFILLAN,
Treasurer of the United States.

TREASURY DEPARTMENT,
Washington City, August 30, 1882.

C.

To the honorable CHAS. J. FOLGER,
Secretary of the Treasury of the United States :

Whereas the sixth section of an act of the Congress of the United States, entitled "An act making appropriations to supply deficiencies in the appropriations for the fiscal year ending June thirtieth, eighteen hundred and eighty-two, and for prior years, and for those certified as due by the accounting officers of the Treasury in accordance with section four of the act of June fourteenth, eighteen hundred and seventy-eight, heretofore paid from permanent appropriations, and for other purposes," approved, August 5, 1882, provides :

"That a board of audit, consisting of the First and Second Comptrollers of the Treasury, and the Treasurer of the United States, is hereby constituted, to whom shall be referred all claims and the determination of all just and reasonable allowances to be made growing out of the illness and burial of the late President James A. Garfield; that the said board shall hear, and examine, and determine all questions arising out of said claims and proposed allowances, and shall make an award in each case for services rendered, or supplies furnished, which, when received, shall be taken in full compensation of all demand whatsoever; that said board of audit shall issue a certificate, signed by each member of said board, setting forth the amount awarded to each person, and on account of what services rendered, or supplies furnished, and shall transmit said certificate to the Secretary of the Treasury, who shall cause to be paid to the several persons named therein, or their legal representatives, the amounts so certified; and to enable the Secretary of the Treasury to pay said awards, the sum of fifty-seven thousand five hundred dollars, or so much thereof as may be necessary, is hereby appropriated; and of this amount not more than thirty-five thousand five hundred dollars in all shall be certified and paid for medical services and attendance; and in making said awards it shall be lawful for said board to make allowances to employes of the government for extra services in amounts not exceeding three months of their current pay: *Provided*, That no claim shall be considered and no allowance shall be made by said board on or after January first, eighteen hundred and eighty-three: *And provided further*, That the aggregate amount of awards made by said board shall not exceed the amount hereby appropriated: *And provided further*, That no claim shall be considered under this section unless the person filing the same shall file a release under seal of all claims against the representatives of the late President, growing out of said illness and burial";

And whereas, under and by virtue of said act, each of the several persons and claimants hereinafter named referred to and filed with said board of audit named in said section a claim for services rendered, or supplies furnished, growing out of the illness and burial of the late President James A. Garfield;

And whereas said claimants respectively did, at the time of the presentation and filing of their respective claims, present and file therewith a release under seal of all claims against the representatives of the late President, growing out of said illness and burial, and did present and file with their respective claims evidence in support thereof;

And whereas said board of audit did hear and examine said several claims and the evidence in support thereof and relating thereto;

And whereas said board of audit did, and now does, determine all questions arising out of said claims and the proposed allowances thereon:

Now, therefore, it is hereby made known, declared, and certified that we, William Lawrence, the First Comptroller in the Department of the Treasury of the United States; William W. Upton, the Second Comptroller in said Department, and James Gilfillan, the Treasurer of the United States, as the members of and constituting said board of audit, having heard and considered said claims and the evidence in support thereof and relating thereto, and having now determined all questions arising out of said claims and the proposed allowance thereof, do now hereby award and determine that there shall be, and is, allowed, to be paid to said claimants, respectively, in full compensation of all demand whatsoever, the sums hereinafter mentioned, for the

services rendered and supplies furnished by them respectively, which sums are determined to be a just and reasonable allowance to said claimants respectively, and which sums so determined, allowed, awarded, and certified are to be paid to said persons respectively, or their legal representatives; and said sums are certified to the honorable the Secretary of the Treasury, to be paid accordingly.

And the said board of audit does now issue this, its certificate of the matters aforesaid, signed by each member of said board, setting forth the names of said claimants, the amounts awarded and herein certified to be paid to them respectively, and on account of what services rendered, or supplies furnished, said amounts are so awarded; and the said board of audit does hereby award to said claimants, respectively, as follows:

Number of claim.	Names of claimants.	Amounts awarded and certified to be paid.	On account of what services rendered, or supplies furnished, said amounts are awarded and certified; being for services and supplies growing out of the illness and burial of the late President James A. Garfield, as provided for in the act of Congress hereinbefore referred to, and as more fully set forth in said claims as filed.
1	D. D. Bliss, M. D., 1829 F street northwest, Washington, D. C.	\$6,500 00	For professional services as physician and surgeon in chief, and for superintending autopsy at Elberon, N. J.
2	D. Hays Agnew, M. D., 1611 Chestnut street, Philadelphia, Pa.	5,000 00	For professional services as consulting surgeon.
3	Frank H. Hamilton, M. D., 43 West Thirty-second street, New York City.	5,000 00	For professional services as consulting surgeon and physician.
4	Robert Reyburn, M. D., 1321 F street northwest, Washington, D. C.	4,000 00	For professional services as consulting physician and surgeon.
5	Silas A. Boynton, M. D., 385 Euclid avenue, Cleveland, Ohio.	4,000 00	For professional services and attendance.
6	Susan A. Edson, M. D., 1308 I street northwest, Washington, D. C.	3,000 00	For skillful attendance in professional capacity as physician.
8	James W. Walsh, 410 East Twenty-sixth street, New York City.	75 00	For services rendered and expenses incurred in embalming body of late President.
9	Charles A. Benedict, 60 Carmine street, New York City.	700 00	For services rendered, supplies furnished, and expenses incurred as undertaker.
12	Henry S. Little, receiver of the Central Railroad Company of New Jersey, care of Robert W. De Forrest, attorney, 120 Broadway, New York City.	1,500 00	For services and expenses in laying special track at Elberon, N. J., for use of same, and for running special trains from Jersey City to Elberon and return.
13	C. T. Jones, Elberon, N. J.	1,162 75	For board, lodging, and attendance for Mrs. Garfield and the suite of the late President, at Elberon, N. J.
11	George W. Knox, 603 Pennsylvania avenue, Washington, D. C.	13 00	For transportation of baggage, from various points, to Baltimore & Potomac Railroad depot.
14	R. K. Helphenstine, corner Fourteenth and F streets, Washington, D. C.	250 00	For prescriptions filled and druggists' supplies furnished.
15	G. G. C. Simms, corner New York avenue and Fourteenth street, Washington, D. C.	78 85	For druggists' supplies furnished.
16	W. S. Thompson, 703 Fifteenth street northwest, Washington, D. C.	13 15	For druggists' supplies furnished.
17	George Tiemann & Co., 67 Chatham street, New York City.	85 27	For surgical supplies furnished.
18	Charles Fischer, 623 Seventh street northwest, Washington, D. C.	186 12	For surgical instruments and supplies furnished.
19	Whyte & Overman, corner Thirteenth and C streets northwest, Washington, D. C.	16 80	For galvanized iron trough furnished for use in cooling late President's room.
20	Independent Ice Company (Charles B. Church, presd't), corner Pennsylvania avenue and Twelfth street, Washington, D. C.	1,176 00	For ice furnished at the Executive Mansion.
22	Milne & Proctor, 934 F street northwest, Washington, D. C.	162 55	For chamber furniture supplied at the Executive Mansion.
23	Singleton & Hoeke, 801 Market Space, Washington, D. C.	122 44	For carpet, flannel, and sheeting furnished at the Executive Mansion.
87	Hoe, Brother & Co., 1328 F street northwest, Washington, D. C.	4 06	For tarleton furnished.
88	Louis H. Schneider, 1010 and 1012 Pennsylvania avenue, Washington, D. C.	7 59	For articles of hardware furnished at the Executive Mansion.
24	W. B. Moses & Son, corner Pennsylvania avenue and Seventh street, Washington, D. C.	40 85	For material and labor in draping the private residence of the late President, and for 1 pillow furnished.

Number of claim.	Names of claimants.	Amounts awarded and certified to be paid.	On account of what services rendered, or supplies furnished, said amounts are awarded and certified; being for services and supplies growing out of the illness and burial of the late President James A. Garfield, as provided for in the act of Congress hereinbefore referred to, and as more fully set forth in said claims as filed.
26	The National Capital Telephone Company (H. D. Cooke, treasurer), 1420 New York avenue, Washington, D. C.	\$50 00	For rental of instruments and exchange service in the physicians' and engineer's rooms at the Executive Mansion.
21	H. L. Cranford, Washington, D. C.	270 00	For services in sprinkling the grounds of the Executive Mansion.
25	Ralph S. Jennings	939 08	For services and expenses in connection with the cooling apparatus at the Executive Mansion.
49	William T. Crump, 1310 V street northwest, Washington, D. C.	300 00	For extra services as steward and as nurse at the Executive Mansion.
40	O. L. Pruden, Executive Mansion.	200 00	For extra services as assistant secretary at the Executive Mansion.
41	William H. Crook, Executive Mansion.	200 00	For extra services as executive clerk at the Executive Mansion.
42	Charles M. Hendley, Executive Mansion.	200 00	For extra services as executive clerk at the Executive Mansion.
43	Warren S. Young, Executive Mansion.	200 00	For extra services as clerk at the Executive Mansion.
44	Henry C. Morton, Executive Mansion.	200 00	For extra services as clerk at the Executive Mansion.
59	E. S. Densmore, Executive Mansion.	200 00	For extra services as sergeant of police at the Executive Mansion.
60	H. L. Atchison, Executive Mansion.	200 00	For extra services as police officer at the Executive Mansion.
47	O. L. Judd, Executive Mansion. . .	150 00	For extra services as telegraphic operator at the Executive Mansion.
45	Joseph S. Bolway, Executive Mansion.	150 00	For extra services as clerk at the Executive Mansion.
51	Charles Loeffler, Executive Mansion.	150 00	For extra services as doorkeeper at the Executive Mansion.
64	Daniel Sprigg, Executive Mansion.	150 00	For extra services as body servant to the late President, and as nurse.
71	Isaiah Lancaster, Executive Mansion.	150 00	For extra services as waiter and as nurse to the late President.
53	J. T. Rickard, Executive Mansion.	150 00	For extra services as doorkeeper at the Executive Mansion.
54	A. C. Smith, Executive Mansion. . .	150 00	For extra services as doorkeeper at the Executive Mansion.
85	Charles H. Lemos, Third Auditor's Office, Treasury Department.	150 00	For extra services at Executive Mansion outside of his official duties as clerk in the Treasury Department.
30	George W. Constantine, care of post-office box 336, Washington, D. C.	150 00	For extra services as machinist, United States Navy, rendered at Executive Mansion.
48	B. F. Montgomery, Executive Mansion.	125 00	For extra services as telegraph operator at the Executive Mansion.
46	Walter R. Duke, Executive Mansion.	100 00	For extra services as clerk at the Executive Mansion.
50	William D. Allen, Executive Mansion.	100 00	For extra services as usher at the Executive Mansion.
52	A. T. Donn, Executive Mansion. . .	100 00	For extra services as doorkeeper at the Executive Mansion.
55	Thomas Dolan, Executive Mansion	100 00	For extra services as mounted messenger at the Executive Mansion.
56	James Sheridan, Executive Mansion.	100 00	For extra services as mounted messenger at the Executive Mansion.
57	Edgar R. Beckley, Executive Mansion.	100 00	For extra services as messenger at the Executive Mansion.
58	Arthur Simmons, Executive Mansion.	100 00	For extra services as messenger at the Executive Mansion.
36	William H. Bailey, care of Col. A. F. Rockwell, United States Army, corner Pennsylvania avenue and Seventeenth street, Washington, D. C.	100 00	For extra services at the Executive Mansion as employé of War Department, specially detailed.
86	John F. Guy, police headquarters, Washington, D. C.	100 00	For extra services as lieutenant of police at Executive Mansion grounds.
62	William H. Du Bois, Executive Mansion.	100 00	For extra services as police officer at the Executive Mansion.
63	William H. Lewis, Executive Mansion.	100 00	For extra services as police officer at the Executive Mansion.
73	Thomas S. Herbert, Executive Mansion.	75 00	For extra services as fireman at the Executive Mansion.
	Beverly R. Lemos, Executive Mansion.	75 00	For extra services as waiter at the Executive Mansion.
76	Jeremiah Smith, Executive Mansion.	75 00	For extra services as house-cleaner at the Executive Mansion.

Number of claim.	Names of claimants.	Amounts awarded and certified to be paid.	On account of what services rendered, or supplies furnished, said amounts are awarded and certified; being for services and supplies growing out of the illness and burial of the late President James A. Garfield, as provided for in the act of Congress hereinbefore referred to, and as more fully set forth in said claims as filed.
33	Abraham W. Dyson, Secretary's Office, Treasury Department.	\$75 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the Treasury Department.
34	Fred. R. Moore, Secretary's Office, Treasury Department.	75 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the Treasury Department.
37	William S. Dupée, Office Secretary of War, War Department.	75 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the War Department.
38	Charles H. Lee, Department of Justice.	75 00	For extra services at the Executive Mansion, outside of his official duties as messenger in the Department of Justice.
39	William Gwin, Department of State.	75 00	For extra services at Executive Mansion and Cleveland, as messenger detailed from State Department.
74	Mary White, Executive Mansion.	75 00	For extra services as laundress at the Executive Mansion.
75	Ella White, Executive Mansion...	60 00	For extra services as laundress at the Executive Mansion.
66	William S. Crawford, Executive Mansion.	50 00	For extra services as driver of steward's wagon.
61	Samuel H. Collins, Executive Mansion.	50 00	For extra services as police officer at the Executive Mansion.
89	Washington Jones, Executive Mansion.	50 00	For extra services as watchman at the Executive Mansion.
82	William Anderson, Executive Mansion.	50 00	For extra services as laborer at the Executive Mansion.
88	Henry Pfister, Executive Mansion	30 00	For extra services as head gardener at the Executive Mansion.
69	James Wilson, Executive Mansion	30 00	For extra services as waiter at the Executive Mansion.
65	George Anderson, Executive Mansion.	20 00	For extra services as coachman at the Executive Mansion.
84	James A. Watt, Executive Mansion.	20 00	For extra services as assistant gardener at the Executive Mansion.
78	Noel Steffani, Executive Mansion.	20 00	For extra services as gardener at the Executive Mansion.
85	Margaret Nugent, 2231 L street northwest, Washington, D. C.	20 00	For extra services as cook at the Executive Mansion.
68	William Willis, Executive Mansion.	15 00	For extra services as hostler at the Executive Mansion.
67	James Simms, Executive Mansion	15 00	For extra services as hostler at the Executive Mansion.
77	William Tillet, Executive Mansion	15 00	For extra services as laborer at the Executive Mansion.
79	Charles Gottenklien, Executive Mansion.	15 00	For extra services as laborer at the Executive Mansion.
80	Arnold Frye, Executive Mansion...	15 00	For extra services as laborer at the Executive Mansion.
81	Patrick Donnelly, Executive Mansion.	15 00	For extra services as laborer at the Executive Mansion.

And this certificate is now transmitted to the Secretary of the Treasury.

All of which is done in pursuance of the said act of Congress and of the powers of said board of audit, this eleventh day of December, A. D. one thousand eight hundred and eighty-two.

WILLIAM LAWRENCE,
First Comptroller.
W. W. UPTON,
Second Comptroller.
JAS. GILFILLAN,
Treasurer United States.

TREASURY DEPARTMENT,
Washington City, D. C.

The following is the report of "the Select Committee to audit the expenses of the late President James A. Garfield's illness and burial," House Report No. 1069, first session Forty-seventh Congress, to wit:

EXPENSES OF THE LAST ILLNESS AND BURIAL OF PRESIDENT GARFIELD.

APRIL 19, 1882.—Committed to the Committee of the Whole House on the state of the Union and ordered to be printed.

Mr. TAYLOR, from the Select Committee to audit the expenses of the late President James A. Garfield's illness and burial, submitted the following report, to accompany bill H. R. 5889:

The Special Committee raised by the House for the purpose of auditing the expenses growing out of the illness and burial of the late President Garfield, and for considering what, if any, allowances, privileges, or pensions should be granted his widow or family, having had said subject under consideration, beg leave to submit the following report:

That, after giving such attention to the subject as its importance demands, your committee are of the opinion that Congress may properly and legally assume the expenses attendant upon the illness and burial of the late President, upon the ground that he was stricken down while he was and because he was in the discharge of his duties as the chief executive officer of the nation and commander-in-chief of the Army and Navy. Congress would also be justified in making provision for such payment, regarding it as an allowance to the family, made to cover extraordinary outlays occasioned by public misfortune.

We do not enter into an argument, however, to prove that that may be done which the people expect and desire shall be done.

Having arrived at this conclusion, your committee proceeded to examine the various claims presented to them which fell within the scope of their authority, and, as they believe, have done so with industry and care.

Many claims have been rejected, not all of which were without merit; and such as were recognized as more or less meritorious, and still rejected, were so treated because their character failed to bring them within the scope of the investigation ordered by the House. Others have been allowed in part only; and all have been rigidly scrutinized, so much so that your committee feel authorized to state that those claims recommended for payment are correct and just. Reference is now had to claims other than those of surgeons, attendants, and employes, to which claims we shall hereafter call attention.

Most of the claims now under consideration grew out of the efforts to reduce the temperature of the sick-room, or are for board of the family and attendants at Elberon, for surgical and medical supplies, for undertakers' bills, and for transportation of the Marine Band to and from Cleveland to attend the funeral, and their subsistence on the way. The various items are so numerous that detailed explanations of all will not be expected.

The bills for the materials and labor for constructing the apparatus for reducing the temperature of the room were furnished to us by the Navy Department, as were also the bills for the transportation and subsistence of the Marine Band, and are vouched for by that Department, the work having been done under its direction in the one case, and the contract made by it in the other. The bills for board, hauling baggage, &c., at Elberon, the undertakers' bills, and lesser bills have passed the scrutiny of Brig. Gen. D. G. Swaim, judge-advocate-general of the Army, and of Col. A. F. Rockwell, U. S. A., who were on the ground and conversant with the facts. The bills for medical and surgical supplies were made under written orders of Dr. Bliss, and on comparison with the orders have been found correct.

Mr. Ralph S. Jennings, of Baltimore, by request of Dr. Bliss, brought machinery at considerable expense to him.

The Pennsylvania Company made large outlays in making railroad track, preparing cars for removing the President to Elberon, and in running trains in accomplishment of that object, as well as in furnishing other transportation, aggregating a very large sum, for which it files no claim and refuses all recompense.

The duty devolving upon your committee of fixing the compensation of the physicians and surgeons attending upon the late President is so difficult that they cannot even hope to have their action meet with universal favor. Indeed, the compensation fixed in this report cannot be said to be wholly satisfactory in the aggregate, or in its distribution, to a single member of the committee uniting in making it. Some of us think the sum too large, others too small; one would change its direction in one particular, while others would apportion it still differently.

The obvious necessity that a conclusion should be reached has compelled divergent views to an agreement of action, combining the average judgment of those acquiescing in the result. It will be found much easier to criticise that result than to present a different one not liable to serious objections.

It may be an interesting process for those who have not yet seriously considered the subject, but who have, as they suppose, more or less fixed opinions in regard to it, to watch the changing operations of their own minds as they contemplate the matter in its different aspects as the investigation proceeds. Possibly glimpses of the difficulties environing your committee may be had in that way.

On the 2d day of July, 1881, the President of the United States, then recently inducted into the great office to which he had been elected, was shot down in a railway depot in the heart of the city of Washington, in the presence of members of his cabinet and of citizens. His wound was supposed to be mortal, and the supposition was only too well founded. The news, instantly carried everywhere, was received with amazement as well as with infinite sorrow by the people. Fears, ill-defined and shapeless, of other impending calamities arose. Soon it was known that the President lived, and it was hoped that his hurt was not necessarily mortal; that eminent surgeons were in attendance upon him at his home, and that it was thought he might recover. From that moment hope and fear alternated till he died at Elberon on the 19th day of the following September.

The occasion was a momentous one, and the surgeons acted during all that time under circumstances of overwhelming responsibility. It is possible that they felt that responsibility overmuch, for the people demanded of them the recovery of their President, day and night, in a voice which they continually heard, and to which they responded with anxious and ceaseless devotion never surpassed, the proofs of which given your committee are so striking and abundant that the wonder is that they remained physically and mentally able to continue to the end. In fact, in several instances, perhaps in all, the strength of the surgeons and other attendants gave way, and their health became impaired; but only in the case of a single attendant did they abate one jot or tittle of their patient, watchful care and skill, nor did that one desist from his attentions and helpfulness till utterly prostrated by disease brought on by his labors.

Upon what rule and by what evidence shall compensation for such services be adjusted? No rule exists ready-made, and no evidence can assist us. We have called upon eminent surgeons far and near to aid us, but their efforts, as must needs be, are without success. All, surgeons and laymen, say, "Deal fairly, liberally, as becomes a just and generous people"; but they do not define to us those terms.

The ordinary schedule of fees or rewards, if one exists, as we think it does not, covering the more important cases of surgery, must give way to a case of extraordinary duration. We find, for instance, that several of these surgeons, by reason of their standing in their profession, their reputation and scientific attainments, frequently receive as much as \$1,000 per day; but that rate of payment could not be expected to continue in one case for weeks and months.

From all professions and from reason we may learn that no rule can be made for compensating services themselves away out of all rule; and we have been compelled to use our judgment in the best way possible, without the aid of experience, or aid from the opinions of others. We have taken into consideration the probable value of the time occupied by the gentlemen if it had been employed in their ordinary professional work, the possible loss of business by the neglect of their practice, their inability to resume their practice by reason of wasted strength and lost health, where such inability existed, the grave responsibilities, the assiduous care, untiring devotion, and long-continued services of the surgeons and attendants; but we have instituted no comparisons, in our own minds even, as to the professional reputation and skill of the gentlemen employed. We have no means of doing so, nor are we competent to decide such questions; besides, we apprehend such attempt might be invidious, harmful, not comporting with the dignity of the government for which we act, and, possibly, hurtful to the feelings of those whom we would tenderly shield. We treat each as equal to any other, and only make distinctions in the amounts awarded because of differences of opportunities and exclusiveness of services of each. Thus, in awarding to Dr. Bliss more than to any other, we do not imply that his skill or fidelity was greater than that of the rest, but the fact is recognized that his was the highest responsibility; that his time was more completely absorbed, and his other practice more fully abandoned, he being constantly in attendance on the President each day and every night, from the beginning to the end, while Drs. Agnew and Hamilton, alternating with each other in attendance, were able to partially keep up their practice in their respective cities, though, counting the time occupied in traveling, each spent more than half his time. Dr. Reyburn also, living and practicing in Washington, though in attendance more than either Dr. Agnew or Dr. Hamilton, was not so cut off from his practice as they were, and he was, therefore, able to, and did, better sustain his practice; and for this reason do we fix the sum to be paid him less than that to be paid them, respectively.

Dr. Boynton stands on a different footing still. He had none of the responsibilities of the case and treatment, but he was more than a nurse, and on account of his acquaintance with the physical constitution and peculiarities of the patient, his close relation to the President and his family, the confidence justly bestowed on him by them, his presence, advice, and services were necessary and invaluable.

Dr. Susan Edson, though a physician of experience and reputation, acted only as nurse and friend, but her services were rendered faithfully and continually, with such zeal and self-denial that she was unable to fully, or to a great extent, resume her practice for several months after her services ceased, and it is quite doubtful if she ever fully recovers her health. She also had the personal confidence of the President and his family fully and generously.

Surgeon-General Barnes and Major Woodward present still another difficulty in the case. They were both in attendance on the President from the beginning till near the close, Dr. Woodward acting as microscopist as well as surgeon; but both these gentlemen belong to the Army of the United States, and with a proper delicacy shrink from accepting a money consideration for professional services, no matter how necessary or important, or how much outside of their ordinary duties. Yielding to this delicacy, but feeling that unjust and invidious distinctions would be made if their services were not properly recognized, your committee recommend that Surgeon-General Barnes, who has grown old and become distinguished in the service of his country, and now holds the rank of brigadier-general in the Army, be advanced to the rank of major-general, with a view of his being placed on the retired list under existing law.

Your committee also recommend that Joseph J. Woodward, who is now a major in the Army, and was brevetted lieutenant-colonel for meritorious services during the war, be promoted to the rank of lieutenant-colonel; but as his regard for the rights and feelings of his brother officers of the same rank, and perhaps older commissions, disinclines him to accept a place to their injury, we are constrained to recommend that a lieutenant-colonelcy beyond the muster now existing be created, and that he be advanced to it.

We fail to see any serious objection to the proposed action in regard to these officers of the Army, as in all other cases where merit and opportunity to distinguish themselves unite in the career of our Army officers, the country should hasten to bestow its approval and proper reward.

This practice already exists and is a wholesome one; and it seems to your committee that if what is here proposed, or something like it, be not done, the services of these gentlemen, as meritorious as those of other surgeons, must be ignored.

The committee feel called upon to make honorable mention of the services of Dr. Smith Towushend, the first surgeon who came to the assistance of the wounded President; of Dr. Charles B. Purvis, who next came; and of Surgeon-General Wales, of the Navy, and Dr. Nathan S. Lincoln, who were immediately called. These gentlemen did all that science and skill could accomplish towards the patient's relief, and to produce reaction from the shock.

Your committee, in view of the largely-increased burdens thrown upon the employés at the Executive Mansion, and the exemplary and faithful manner in which they discharged their several duties, have thought proper to, and do, ask the House to grant them two months' additional pay; excepting that they recommend that Daniel Sprigg receive three months' additional pay, and that there be allowed Mr. Crump the sum of \$3,000. Sprigg was servant to the President, and attended as nurse, being always within call, and attending to the more unpleasant duties of the sick-room, while Steward Crump lost his health, probably permanently, and incurred large expenses in his effort to recover from illness brought about solely by his devoted attention and labors in waiting on the President.

Your committee hope that it will not be deemed out of place to mention here the names of General Swaim, Colonel Rockwell, J. Stanley Brown, and C. O. Rockwell among those who devoted, without thought of personal discomfort or weariness, their whole time during the illness of the President to his comfort and service.

Your committee think there should be allowed the widow and family of the late President an amount equal to one year's salary, after deducting all payments made on account of salary.

Your committee herewith report, and make a part hereof, a schedule of the claims passed, and the allowances made, together with a roll of those employed at the Executive Mansion, and also report a bill covering the findings and recommendations of the committee, section 1 of which is reported as a substitute for House bill No. 1227, which was referred to them, and they respectfully ask the passage by the House of the bill so reported.

Schedule of claims passed and allowances made, as referred to in the foregoing report:

Allowance to Mrs. Lucretia R. Garfield of one year's salary, less payments already made.

Dr. D. W. Bliss.....	\$25,000 00
Dr. D. H. Agnew.....	15,000 00
Dr. F. H. Hamilton.....	15,000 00
Dr. Robert Reyburn.....	10,000 00

Dr. S. A. Boynton.....	\$10,000 00
Dr. Susan Edson.....	10,000 00
William Crump.....	3,000 00
R. S. S. Jennings, expenses \$724.08; use of property \$275.92.....	1,000 00
Navy Department expenses.....	2,225 40
Navy Department expenses of Marine band.....	527 00
William R. Speare, undertaker.....	1,835 50
C. A. Benedict, coffin, trimmings, &c., and undertaking.....	887 50
Independent Ice Company.....	1,516 92
H. L. Crawford, sprinkling streets near Executive Mansion.....	270 00
C. T. Jones, board, carriages, &c., Elberon.....	1,092 25
William Schoonmaker.....	16 00
Geo. Tieman, surgical instruments and supplies.....	85 27
W. B. Moses & Son.....	40 35
R. K. Helphenstine, medicines.....	278 35
Geo. W. Knox.....	13 00
White & Overman.....	16 80
Singleton & Hoeke.....	122 44
Telephone Company.....	50 00
C. F. Schmidt.....	50
Herman W. Atwood.....	75
Milne & Proctor, bedstead and mattress.....	162 55
Cleveland Transfer Company.....	14 00
Shuster & Sons.....	9 00
L. H. Schneider.....	7 59
Hoe brothers & Co.....	4 06
G. G. Simms.....	71 10
W. S. Thompson.....	18 15

List of employes at the Executive Mansion during the illness of President Garfield, to whom the committee allow additional pay, with a statement of their salaries per year and month.

	Per year.	Per month.
O. L. Pruden, Assistant Secretary.....	\$2,250	\$187 50
W. H. Crook, Executive Clerk.....	2,000	166 66
Charles M. Hendley, Executive Clerk.....	2,000	166 66
H. C. Morton, clerk.....	1,800	150 00
W. S. Young, clerk.....	1,800	150 00
J. S. Bolway, clerk.....	1,400	116 66
W. R. Duke, clerk.....	1,200	100 00
O. L. Judd, telegraph operator.....	1,400	116 66
B. F. Montgomery, telegraph operator.....	1,200	100 00
Charles Loeffler, doorkeeper.....	1,200	100 00
W. D. Allen, doorkeeper.....	1,200	100 00
J. T. Rickard, doorkeeper.....	1,200	100 00
A. C. Smith, doorkeeper.....	1,200	100 00
A. T. Donn, doorkeeper.....	1,200	100 00
E. S. Dinamore, sergeant police.....	1,140	95 00
H. L. Atchison, policeman.....	1,080	90 00
W. S. Lewis, policeman.....	1,080	90 00
William Dubois, policeman.....	1,080	90 00
Thomas F. Pendel, messenger.....	1,200	100 00
James Sheridan, messenger.....	1,200	100 00
Thomas Dolan, messenger.....	1,200	100 00
A. Simmons, messenger.....	1,200	100 00
Charles Lemos, messenger.....	900	75 00
E. R. Beckley, watchman.....	900	75 00
W. J. Smith, watchman.....	864	72 00
T. L. Herbert, fireman.....	864	72 00
Beverly Lemos, servant.....	720	60 00
Daniel Sprigg, servant.....	720	60 00
George Washington, servant.....	720	60 00
Isaiah Lancaster, servant.....	720	60 00
Jerry Smith, servant.....	720	60 00
Mary White, laundress.....	240	20 00
Ella White, laundress.....	240	20 00
William Crawford, driver.....	360	30 00
Samuel Collins, policeman.....	900	75 00
Fred. Moore, messenger.....	900	75 00
Charles Lee.....	900	75 00
William Dupee.....	720	60 00
William Gwinn.....	720	60 00

VIEWS OF THE MINORITY.

The undersigned, members of the special committee authorized to audit certain expenses growing out of the sickness and burial of the late President Garfield, respectfully dissent from the report of the majority of the committee for the following reasons: We do not object to the payment by the General Government of the funeral expenses of the late President, who was stricken down in the performance of his duties and because of his occupying a public station. Our objection to the report of the committee grows out of the recommendation for payment for the services of the physicians and surgeons who attended the late President during his illness. The amounts recommended to be paid by the majority of the committee are as follows: To Dr. D. W. Bliss, \$25,000; to Drs. Hamilton and Agnew, \$15,000 each; to Drs. Reyburu and Boynton, and to Mrs. Dr. Edson, \$10,000 each, making a total for professional services of \$85,000. In addition to this the committee recommend the promotion of Drs. Barnes and Woodward with increased pay in accordance with their promoted rank. There was no evidence before the committee, *ex parte* or otherwise, tending to establish the character of the services rendered or the value of such services. The undersigned were perfectly willing to concede that liberal compensation should be allowed to the physicians and surgeons, a compensation in excess even of what it were possible for any of the medical attendants to have earned in ordinary practice during the time, but the sums recommended to be paid by the majority of the committee are deemed by the undersigned to be excessive and out of proportion to the services rendered.

No accounts or bills were presented by any physician or surgeon, with perhaps one exception. No witnesses were called, no evidence by affidavit or otherwise submitted upon which the committee could base its finding. The conclusion reached by the majority of the committee was therefore based upon such information as had been derived from reading the newspapers, and does not differ in the least from that which every gentleman possesses who pays any attention to the news of the day. The undersigned were of the opinion that there was no extraordinary medical skill exhibited in the treatment of the case, and nothing calling for an extraordinary allowance for professional services; but, while willing to be liberal, they could not consent to the manner of payment recommended, nor to extravagance and wanton lavishment of the public funds.

The undersigned also respectfully protest against that part of the report of the majority which recommends the promotion of Surgeon-General Barnes to a major-general's rank, and retirement thereunder, and to the recommendation for promotion of Dr. Woodward from a major to a lieutenant-colonel, with rank and pay of the latter office. The undersigned are of the opinion that this committee has no jurisdiction to make any recommendation with regard to the military establishment. The committee could only consider such matters as were referred to them by the resolution of the House. The resolution authorized us to audit certain expenses, and not to recommend promotions in the military service of the Government.

There is no precedent, so far as we have been able to learn, for Congress assuming to pay for the services of physicians attending upon persons in civil positions; but in view of the circumstances of the assault upon the late President, and of the great interest of the people in his recovery, the undersigned were willing that the Government should assume to pay such sums for professional services as might lawfully have been recovered from the estate of the late President, and were desirous of treating such claims as claims against the estate of the deceased rather than as properly cognizable by Congress. They were willing, therefore, to appropriate to the estate such portion of the unearned salary of the late President as would cover all such claims; but they cannot agree that sums shall be appropriated for professional services far in excess of the value of such services, and which sums are bottomed upon claims not formally presented, and supported by no evidence as to the value of the services rendered. For these reasons the undersigned respectfully protest against the passage of the bill reported by the majority of the committee, and recommend the adoption of the following resolution:

Resolved, That the report of the majority of the committee, together with the bill accompanying said report, be recommitted, with instructions to the committee to require all persons having claims cognizable by said committee to present accounts thereof, and to require claimants in all cases to furnish proof as to the value of services rendered or material furnished; and, in the case of allowances for professional services as physicians or surgeons, to make such allowances only as would be properly chargeable to and provable against the estate of the late President, and to provide in the bill, when again reported, such further appropriation of unearned salary as would cover the amounts audited for such professional services.

All of which is respectfully submitted.

JO. C. S. BLACKBURN.
WILLIAM M. SPRINGER.
BENJAMIN LEFEVRE.

CLAIMS-ASSIGNMENT CASE. (*Ante* 13-36.)

While, as was said in this case (*ante* 14), the assignment by an officer of his salary not yet due is contrary to public policy and void at common law, still the claim of a citizen of the United States against a foreign government, the ascertainment and payment of which are provided for by treaty between the United States and such foreign State, is assignable by operation of law, and not within the statute against assignments. (*Comegys et al. v. Vasse*, 1 Pet., 213.) So by bankruptcy. (*Phelps v. McDonald*, 99 U. S., 298; s. c., 2 Mac Arthur, 375; *Burke v. United States*, 13 Ct. Cl., 231; *Erwin v. United States*, *Id.*, 49; s. c., 97 U. S., 392; *Clark v. Clark et al.*, 17 How., 315; *Comegys et al. v. Vasse*, 1 Pet., 193.)

So a voluntary assignment of such claim passes to the assignee the equitable title thereto. (*Judson v. Corcoran*, 17 How., 612.)

ATHERTON & CO.'S CASE. (*Ante* 315-320.)

In this case it was said (*ante* 318) that "the principle settled in *Stoll v. Pepper* [97 U. S., 438] is, that, if a distiller uses material for distillation in excess of the estimated capacity of his distillery, but pays the taxes upon his entire production, he cannot be again assessed on spirits which the excess of material should have produced, according to the estimated capacity of the distillery."

Before the decision in *Stoll v. Pepper*, if a distiller used material in excess of the estimated capacity of his distillery, and his production was less than at the rate of such estimated capacity, he was taxed on spirits that should have been produced from the excess of material according to the estimated capacity of the distillery. But in *Stoll v. Pepper* it was decided that this was "double taxation," and that, in such case, a distiller should be taxed on spirits that should have been produced from such excess of material, not according to the estimated producing capacity of his distillery per bushel, but at a rate of production equal to the difference between the estimated rate and the actual rate of production as shown by the number of bushels of material used and the number of gallons of spirits produced.

Hence, in order to comply with the requirements of this decision of the Supreme Court of the United States, the following circular was issued by the Commissioner of Internal Revenue, to wit:

(CIRCULAR No. 195.)

**CONCERNING ASSESSMENTS ON ACCOUNT OF AN EXCESS OF GRAIN OR
MOLASSES USED BY A DISTILLER.**

[1879. Department No. 6. Internal Revenue.]

**TREASURY DEPARTMENT,
OFFICE OF INTERNAL REVENUE,
Washington, D. C., January 2, 1879.**

Under the statute, as recently construed by the United States Supreme Court in the case of *Stoll et al. v. Pepper*, the following is the correct mode of computing the tax on distilled spirits in cases where grain or molasses is used in excess of the quantity allowed by the survey.

First. Divide the whole number of the gallons of the reported product of the month by the whole number of bushels of grain used during the month. The quotient, so found, will show the reported product of each and every bushel of such grain. Then multiply that quotient, *i. e.*, the reported product of one bushel, by the number of bushels of grain allowed by the survey. The result will show the reported product of all the grain so allowed. If that reported product equals or exceeds eighty per centum of the surveyed capacity of the distillery, and the entire actual product has been reported, there exists no liability to assessment for or on account of the grain used under the survey. But if that reported product is less than eighty per centum of such capacity there is liability to an assessment for the deficiency.

Second. If the reported product per bushel, found as above, is less than the full statutory estimate of the producing capacity per bushel, multiply the number of bushels of grain used in excess of the surveyed capacity by the difference between such reported product and such statutory estimate. The result will show the quantity upon which an assessment is to be made for and on account of the grain used in excess.

The legal tax will thus be realized—1st. Upon the entire actual product of the grain used under the survey, but in no case on less than eighty per centum of the surveyed capacity; and 2d. Upon the entire actual product of the grain used in excess of the survey, but in no case on less than one hundred per centum of the statutory estimate of the producing capacity of the grain so used.

The foregoing rule applies equally to molasses distilleries, gallons of molasses being substituted for bushels of grain.

GREEN B. RAUM,
Commissioner.

BOARD OF HEALTH CASE. (*Ante* 221-225.)

The act of August 7, 1882 (22 Stat., 315), appropriates—

“For salaries and expenses of the National Board of Health as follows:

“For pay and expenses of the members of the National Board of Health, ten thousand dollars.

“For pay of Secretary and disbursing agent, and pay of clerks, messengers, and laborers, five thousand five hundred dollars.

“For rent, light, fuel, furniture, stationery, telegrams, and postage, two thousand dollars.

“For miscellaneous expenses, five hundred dollars.

* * * * *

“For aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States, fifty thousand dollars.”

In this case it was said (*ante* 221, 223), referring to the appropriation of “fifty thousand dollars,” in the last clause above, that “this appropriation cannot be used for any other purposes than those specified in the clause appropriating” it. “In other words, the use of the appropriation is limited, by the act making it, to rendering aid to State and local boards of health and to local quarantine stations in carrying out their rules and regulations to prevent the introduction and spread of contagious and infectious diseases in the United States.”

In accordance with the decision in this case, and to meet all cases of like character, the following circular was issued by the First Comptroller, to wit:

(Circular.)

INFORMATION FOR DISBURSING OFFICERS, AND FOR OFFICERS AND AGENTS AUTHORIZED TO PURCHASE SUPPLIES.

[1883.—Department No. 55, First Comptroller's Office.]

**TREASURY DEPARTMENT,
FIRST COMPTROLLER'S OFFICE,
Washington, D. C., May 12, 1883.**

Section 3622 of the Revised Statutes requires every disbursing officer to render his accounts to the proper Auditor “with the vouchers necessary to the correct and prompt settlement thereof.”

Many of the acts of Congress making appropriations classify the appropriations under general heads, followed by a statement showing the particular service to which they are to be respectively applied. Thus, as an example, the act of August 7, 1882 (22 Stat., 331), makes an appropriation as follows:

“**FREEDMEN'S HOSPITAL AND ASYLUM.**—For the Freedmen's Hospital and Asylum, Washington, District of Columbia, as follows: For subsistence, twenty-four thousand dollars; for salaries and compensation of the surgeon-in-chief, two assistant surgeons, engineer, matron, nurses, and cooks, nine thousand five hundred dollars; for fuel and light, three thousand dollars; for clothing, bedding, forage, transportation, and miscellaneous expenses, six thousand dollars; for rent of hospital buildings and grounds, four thousand dollars; for medicines and medical supplies, one thousand five hundred dollars; for repairs and furniture, two thousand dollars; in all, fifty thousand dollars.”

The account kept of this appropriation in the Warrant Division of the office of the Secretary of the Treasury, and in the office of the First Comptroller, is under the caption of “Support of Freedmen's Hospital and Asylum, 1883.” There is no separate account for “subsistence,” or for “salaries and compensation.” But under this appropriation no

expenditure can be made for "subsistence" in excess of the sum of \$24,000, appropriated for that purpose, nor can the expenditures for any of the other specific objects enumerated lawfully exceed the sum appropriated therefor.

Disbursing officers are required to return with their accounts *separate schedules* of the expenditure for each of the designated specific objects, and each voucher must show the specific object for which it was paid. The ordinary annual appropriation acts are made for the service of a specified fiscal year. When such act authorizes the purchase of supplies, such purchase should be made, as nearly as practicable, in an amount equal to the requirements of the service for that year, and not in excess of the gross amounts appropriated. If it becomes apparent that the appropriation is in excess of the requirements of the service of the fiscal year, it is not lawful to expend the whole appropriation, and thus accumulate supplies for the next fiscal year. The excess of the sum appropriated beyond that required for the service of the fiscal year for which it is made should be left unexpended, to be carried at the proper time to the credit of the surplus fund.

WILLIAM LAWRENCE,
Comptroller.

APPENDIX.

ORGANIZATION AND DUTIES
OF
THE OFFICES OF THE TREASURER OF THE UNITED STATES
AND
THE REGISTER OF THE TREASURY.

APPENDIX.

CHAPTER I.

ORGANIZATION AND DUTIES OF THE OFFICE OF THE TREASURER OF THE UNITED STATES.

The office of the Treasurer of the United States was established by the act of September 2, 1789 (1 Stat., 65; Rev. Stat., 301).

By the same act (Rev. Stat., 305) the duties of the office were prescribed as follows:

To receive and keep the moneys of the United States;

To disburse the same upon warrants drawn by the Secretary of the Treasury, countersigned by either Comptroller, and recorded by the Register, and not otherwise;

To take receipts for all moneys disbursed and to give receipts for all moneys received by him, and all receipts for moneys received by him shall be indorsed upon warrants signed by the Secretary of the Treasury;

To render his accounts to the First Comptroller quarterly, or oftener if required, and transmit a copy thereof, when settled, to the Secretary of the Treasury;

To lay before Congress, on the third day of every (ordinary) session, copies of all accounts by him rendered to and settled with the First Comptroller, and a true and perfect account of the state of the Treasury (Rev. Stat., 311).

By the act of June 3, 1864 (13 Stat., 104; Rev. Stat., 5133, *et seq.*), he is made the custodian of the bonds deposited to secure circulating notes of national banks.

He is also the custodian of the bonds deposited to secure the safe-keeping and prompt payment of public money on deposit with national banks designated as depositories, as provided in the same act (13 Stat., 113).

By the same act (*Id.*, 111), as amended by an act of March 3, 1883, entitled "An act to reduce internal-revenue taxation," &c., it is his duty to assess and collect the tax imposed upon national banks.

To redeem the circulating notes of national banks in liquidation (*Id.*, 112), and of banks that have failed (*Id.*, 114).

By the act of June 20, 1874 (18 Stat., 123), he is made the redemption agent of all national banks.

By the act of March 3, 1875 (*Id.*, 505), he receives on deposit and

pays upon warrants of the accounting officers of the District, issued under the direction of the Commissioners of the District, all moneys of the District of Columbia.

By the act of June 10, 1876 (19 Stat., 58), he is made the custodian of all bonds and other securities held in trust for the benefit of certain Indian tribes; collects and deposits the interest accruing on the same, and sells, or otherwise disposes of, the same as Congress or the Secretary of the Interior may direct.

By the act of June 11, 1878 (20 Stat., 107), the duties and powers of the Commissioners of the Sinking Fund of the District of Columbia were transferred to him.

By the act of August 6, 1846 (9 Stat., 59; Rev. Stat., 3593), all public moneys paid into any depository are subject to the draft of the Treasurer, drawn agreeably to appropriations made by law.

He directs the payment by sub-treasury offices of the warrants drawn on him by the Postmaster-General.

He is the custodian of such bonds and other securities held in trust by the Secretary of the Treasury as may be deposited with him by that officer.

Under the act of June 22, 1882 (22 Stat., 108), he disburses the salaries and mileage of Senators, Representatives, and Delegates in Congress, when the officer charged with that duty is incapacitated.

The office of Assistant Treasurer of the United States at Washington was established by the act of March 3, 1863 (12 Stat., 761; Rev. Stat., 303). This officer acts in the place, and discharges any or all the duties, of the Treasurer, as that officer at his discretion, with the consent of the Secretary of the Treasury, may direct (Rev. Stat., 304).

The present organization of the office of the Treasurer of the United States was authorized by the act of March 3, 1875 (18 Stat., 397, 398, 399). The work is divided as follows into nine branches:

- I.—Under the Chief Clerk.
- II.—Under the Cashier.
- III.—The Division of Accounts.
- IV.—The Division of Loans.
- V.—The Division of Issues.
- VI.—The Division of Redemption.
- VII.—The Division of National Banks.
- VIII.—The National Bank Redemption Agency.
- IX.—The District of Columbia Sinking Fund Office.

I.—UNDER THE CHIEF CLERK.

- 1. Opening, briefing, recording, and distributing the official mail received, and work incidental thereto.
- 2. Copying official letters and telegrams, and indexing the same.
- 3. Dispatching all mail matter.

4. Preparing in duplicate a daily statement of the issues and redemptions of the United States currency from reports received from other divisions.

5. Conducting correspondence of a general nature not assignable to any division of the office.

6. Preparing for execution bonds of indemnity, for the issue of duplicates of lost drafts or checks, conducting correspondence relative thereto, and keeping in custody such bonds when executed.

7. Ordering stationery, printing, and supplies for the office.

8. Keeping the record of attendance of employés of the office.

9. Keeping in custody the archives, files, and property of the office.

10. Keeping in custody and issuing blank checks and certificates of deposit and checks for disbursing officers.

11. Disbursing the salaries of employés.

12. Mailing circulars, directing the work of laborers, sweepers, &c.

II.—UNDER THE CASHIER.

This branch of the work of the office is divided into two parts:

1. That of a general nature.

2. That identical with the work of the sub-treasury offices.

The work of a general nature consists of:

(1.) Supervising the issue and redemption of United States notes, coin, and coin certificates, and keeping in custody the "Reserve Fund" of such notes and certificates.

(2.) Shipping notes and coin.

(3.) Shipping to and recording issues by sub-treasury offices of currency certificates of deposit issued under the act of June 8, 1872 (17 Stat., 336).

(4.) Keeping the accounts of the Treasurer as fiscal agent for the payment of the public debt and the interest thereon, and for the payment of the interest on Pacific Railway bonds.

(5.) Keeping the accounts of the Treasurer as special agent for the payment of the debt of the District of Columbia and the interest thereon.

(6.) Drawing requisitions for reimbursing warrants for disbursements on account of public debt, based upon daily reports of transactions from the Divisions of Loans, Issues, and Redemptions.

(7.) Keeping the accounts of transfer checks issued by the Treasurer on sub-treasury offices, and examining such checks when paid and returned.

(8.) Paying unclaimed interest on registered United States and Pacific Railway bonds returned unpaid on schedules by sub-treasury offices.

(9.) Paying salaries and mileage of Representatives and Delegates in Congress.

(10.) Conducting correspondence relating to the subjects named above.

The part of the work identical with that of a sub-treasury office consists of:

- (1.) Receiving deposits, paying checks, and keeping accounts of disbursing officers and of other public officers located in Washington.
- (2.) Keeping the account of the fund for the redemption of national bank notes.
- (3.) Receiving moneys into the Treasury and issuing certificates of deposit therefor; and paying drafts when drawn on the Treasurer.
- (4.) Paying coupons, interest checks, and interest-bearing notes.
- (5.) Issuing and redeeming United States notes, coin, and gold, silver, and currency certificates.
- (6.) Rendering daily transcripts of account.
- (7.) Supervising jointly with other bureaus of the Department the destruction of notes and securities.
- (8.) Collecting drafts upon banks and bankers, received in the course of business.
- (9.) Issuing and mailing certificates for deposits of postal revenues received from postmasters.
- (10.) Keeping various accounts incidental to the preceding branches of work.
- (11.) Conducting correspondence relating to the subjects named.

III.—THE DIVISION OF ACCOUNTS.

In this division are kept the accounts of the receipts and expenditures of the Government, and accounts subsidiary and necessary thereto. Reports, and transcripts of account, are received daily from sub-treasury offices, and four times a month from United States mints and assay offices and from national banks designated as depositaries of public moneys.

The work may be classified as follows:

1. Journalizing the receipts into the Treasury as shown by the transcripts received.
2. Journalizing the warrants of the Secretary of the Treasury, covering the receipts into the Treasury, verifying the same by the journal of receipts wherein the source of revenue is indicated.
3. Journalizing the pay warrants of the Secretary of the Treasury, and registering the same by class, as War, Navy, Interior, &c.
4. Issuing drafts on pay warrants; examining, registering (by class), and mailing the same; and notifying the sub-treasury office or designated depositary on which they are drawn of such drafts.
5. Registering warrants of the Post-Office Department. (Separate accounts are kept of the revenues received for the service of the Post-Office Department.)
6. Journalizing from the transcripts the payments of drafts, examining the drafts returned paid, and recording the payment on the draft register.
7. Compiling daily (for publication monthly) a statement of the

Assets and Liabilities of the Treasury, from the transcripts and other reports.

8. Keeping the General Treasury Transfer Account; issuing transfer orders on sub-treasury offices, mints and assay offices, and transfer letters on national banks designated as depositaries for the transfer of funds from one point to another; journalizing receipts and payments of such transfers from the transcripts of account.

9. Issuing orders for the distribution from mints of standard silver dollars.

10. Keeping a general record, based upon reports received from other divisions, of the issues and redemptions of obligations of the United States.

11. Preparing the Statement of the Treasurer's Quarterly Account (Rev. Stat., 305), for reference to the First Auditor, with which the paid drafts attached to the warrants upon which they were issued are transmitted as vouchers. A copy of this Statement is prepared for transmission to Congress (Rev. Stat., 311).

12. Examining the weekly reports made by disbursing officers to whom advances are made by the Department, of the balances to their credit; comparing the same with similar reports received from the offices or depositaries where such accounts are kept.

13. A separate account is kept with each sub-treasury office, mint, assay office, and designated depositary.

14. All correspondence relating to the above-named subjects is conducted in the division.

IV.—THE DIVISION OF LOANS.

The work of this division pertains to the retirement of the public debt and the payment of interest thereon.

1. The retirement of bonds received through the office of the Secretary of the Treasury :

a. By redemption, uncalled as well as called, for the proceeds of which transfer checks on sub-treasury offices are mailed to the payees;

b. By conversion into bonds of another description, for the proceeds of which a certificate is issued and transmitted to the Secretary's office for the issue of the new bonds, and the balance, if any (of the proceeds), paid by check ;

c. By purchase, the proceeds of which have been paid by the sub-treasury office authorized to make the purchase (usually that at New York).

2. The examination of all bonds received, the computation and statement of the interest due thereon, and a duplicate record of the transaction; bonds retired for the sinking fund being accounted for separately.

3. The conversion of refunding certificates received by the Division of Redemption, for the proceeds of which, when ascertained, a certificate for the issue of bonds of the funded loan (consols) of 1907, and a transfer check for the balance, if any, is issued, and the transaction recorded.

4. Daily reports of all the transactions named above are sent to the Cashier and to the Division of Accounts.

5. The examination and record of gold certificates issued under the act of March 3, 1863 (12 Stat., 711) (not now issued), and of currency certificates of the act of June 8, 1872 (17 Stat., 336), when returned paid from sub-treasury offices.

6. Counting, examining, and keeping a denominational record of coupons from United States bonds and from bonds of the District of Columbia 3.65 per cent. loan, paid at and received from sub-treasury offices.

7. Issuing from schedules received from the Register of the Treasury, registering, and mailing checks for the interest on registered bonds of the United States, of the District of Columbia 3.65 per cent. loan, and of the "Pacific Railway bonds."

8. Examining and recording the payment of such checks when returned paid by sub-treasury offices.

9. Reporting the daily receipts of certificates, coupons, and interest checks to the cashier.

10. Forwarding all the securities as vouchers, with the monthly statements of such payments, to the First Auditor for settlement.

11. All correspondence relating to the subjects named is conducted in this division.

V.—THE DIVISION OF ISSUES.

1. Counting all new United States notes, and gold, silver, and currency certificates, received from the Bureau of Engraving and Printing; keeping a numerical and denominational record of the same; and delivering the same to the Cashier.

2. Counting subsidiary silver and minor coin received for redemption or upon transfer orders from the mints and sub-treasury offices; keeping a denominational record of the same; and delivering the same to the Cashier.

3. Counting standard silver dollars received in exchange for silver certificates; keeping a record of the same; and delivering the same to the Cashier.

4. Counting, and assorting by banks of issue, circulating notes of national banks that have failed, or which went into liquidation prior to July 12, 1882, received for redemption; keeping a record of the same; and delivering the same to the Comptroller of the Currency.

5. Reporting the daily transactions to the Cashier, and reporting the receipts of new United States notes to the Chief Clerk.

VI.—THE DIVISION OF REDEMPTION.

1. Counting and assorting United States notes, fractional currency, and gold and silver certificates received for redemption; keeping a denominational record of and canceling the same; cutting the notes, when made up into uniform packages, in halves longitudinally, and delivering the half-notes to the offices of the Secretary and Register, respectively, for recount.

2. Counting and canceling refunding certificates received for conversion; keeping a record of such receipts; and reporting, with a statement, to the Division of Loans, through which division they are passed for settlement to the First Auditor.

3. Counting remittances received from postmasters on account of postal revenues, and reporting thereon to the Cashier.

4. Making returns for notes and certificates redeemed, either by transfer check on sub-treasury offices, by credits, by requesting shipments of new money by the Cashier, or otherwise, as desired.

5. Making reports of the daily redemptions to the Cashier and to the Division of Accounts; and of the destruction of money to the Chief Clerk.

6. Conducting correspondence relating to the subjects named.

VII.—THE DIVISION OF NATIONAL BANKS.

This division has the custody of all bonds deposited under the act of June 3, 1864 (13 Stat., 104), and acts in amendment thereto, to secure the redemption of circulating notes of national banks; of the bonds deposited under the same act (*Id.*, 113) by national banks designated as depositaries of public moneys, to secure the safe-keeping and prompt payment of such moneys; and of all bonds and other securities held by the Treasurer in trust, or as custodian. The work consists of—

1. Receiving from the Comptroller of the Currency bonds to be deposited to secure circulation; keeping the accounts of such deposits; forwarding to the respective banks receipts for such bonds; and returning the same to the Comptroller of the Currency, properly assigned, upon return of the Treasurer's receipt, in accordance with law.

2. Receiving from banks designated as depositaries of public moneys bonds to be deposited as security for such moneys; keeping the accounts of such deposits of bonds, and forwarding receipts therefor; returning the bonds to the banks or upon their orders, properly assigned, upon return of the Treasurer's receipt, in accordance with law.

3. Supervising and recording the examination, by authorized agents of the banks, of bonds on deposit, and furnishing a duplicate certificate of such examination to the bank. (*Id.*, 106.)

4. Assessing and collecting the tax imposed upon the banks. (*Id.*, 111, amended by act of March 3, 1883, entitled "An act to reduce internal-revenue taxation," &c.)

5. Conducting correspondence relating to the subjects named.

VIII.—THE NATIONAL-BANK REDEMPTION AGENCY.

This branch of the office was organized under the act of June 20, 1874 (18 Stat., 123), requiring from national banks a deposit, in lawful money of the United States, equal to 5 per cent. of their circulating notes, for the redemption of such notes, the expense thereof to be reimbursed by the banks, and making the Treasurer the redemption agent. The work consists of—

1. Receiving remittances for the redemption fund; depositing the

same in the Treasury; and keeping accounts with the respective banks of the fund of each on deposit.

2. Counting and assorting by denominations notes received for redemption; keeping the accounts of the redemptions; and making returns to the banks forwarding the notes by transfer checks on sub-treasury offices, by credits or otherwise.

3. Assorting the notes redeemed, first by groups of banks, divided alphabetically according to location, and afterwards by banks of issue; canceling notes unfit for circulation; and delivering the same to the Comptroller of the Currency for the issue of new notes, notifying the banks of issue of such cancellation and delivery.

4. Returning assorted notes fit for circulation to the banks of issue, and charging them with amounts of the same in redemption-fund account.

5. Keeping the accounts of the expenses incurred in the redemption of notes, and assessing such expenses upon the issuing banks at the end of each fiscal year *pro rata* per \$1,000 of notes redeemed.

6. Keeping separate accounts of the redemption of notes of banks that have gone into liquidation or are reducing circulation.

7. Conducting correspondence relating to the subjects named.

IX.—THE DISTRICT OF COLUMBIA SINKING-FUND OFFICE.

The work of this branch of the office is that devolving upon the Treasurer as Commissioner of the Sinking Fund of the District of Columbia, and includes all transactions relative to the debt of the District, excepting the payment of interest on the 3.65 per cent. loan. It may be classified as follows:

1. Disbursing the appropriations for the sinking fund, and for the payment of interest other than that of the 3.65 per cent. loan.

2. Keeping a numerical register of all bonds, coupons, and certificates redeemed, and transmitting the obligations, as vouchers, with a statement, to the First Auditor for settlement.

3. Issuing or selling bonds of the 3.65 per cent. loan to satisfy judgments of the Court of Claims (act March 3, 1881, 21 Stat., 466), and issuing said bonds in redemption of "Board of Audit certificates." (Act June 16, 1880, 21 Stat., 286.)

4. Keeping a record and numerical register of the issue of bonds of the 3.65 per cent. loan, and of the exchanges of coupon for registered bonds of said loan.

5. Keeping the detailed account of "tax-lien certificates," and applying the proceeds of collections of such certificates to the redemption of "8 per cent. certificates."

6. Keeping in custody bonds in which the amounts retained from pay of street contractors are invested. (Act June 11, 1878, 20 Stat., 106.)

7. Preparing for publication quarterly the statement of the debt of the District.

8. Conducting correspondence relating to the subjects named.

CHAPTER II.

ORGANIZATION AND DUTIES OF THE OFFICE OF THE REGISTER OF THE TREASURY.

The office of the Register of the Treasury was created by the act of September 2, 1789 (1 Stat., 65; Rev. Stat., 312). The Register is practically the official bookkeeper of the United States, and the duties performed by the office are:

First. Keeping all accounts of the receipts and expenditures of the public moneys, and of all debts due to or from the United States (Rev. Stat., 313).

Second. Receiving from the First Comptroller and Commissioner of Customs the accounts which shall have been finally adjusted, and preserving such accounts with their vouchers and certificates (Rev. Stat., 313).

Third. Recording all warrants for the receipt or payment of moneys at the Treasury, and certifying the same thereon, except those drawn by the Postmaster-General, and those drawn by the Secretary of the Treasury upon the requisitions of the Secretaries of the War and Navy Departments (Rev. Stat., 313).

Fourth. Transmitting to the Secretary of the Treasury copies of the certificates of balances of accounts adjusted (Rev. Stat., 313).

Fifth. Furnishing to the proper accounting officers copies of all warrants covering proceeds of Government property, where the same may be necessary in the settlement of accounts in their respective offices (Rev. Stat., 313).

Sixth. Keeping a record of all certificates of registry, enrollments, and licenses issued to, and surrendered by, vessels of the United States (Rev. Stat., 4158, 4312, *et seq.*).

Seventh. Issuing and transferring all Government bonds; opening ledger accounts with holders of registered bonds, and declaring dividends of interest thereon; keeping a register of all transfer authorities; acting as custodian of all bonds issued, redeemed, and transferred, redeemed coupons, gold certificates, certificates of indebtedness, interest notes, and interest checks.

Eighth. Keeping a record of all redeemed coupon bonds, coupons, gold certificates, interest notes, certificates of indebtedness, and interest checks, both in numerical registers and by ledger accounts.

Ninth. Preparing schedules to accompany coupon bonds on transmittal to destruction committee, and schedules of all redeemed coupons.

Tenth. Examining, counting, and canceling four per cent. refunding

certificates, the upper halves of United States notes, gold certificates, and silver certificates, and the right-hand halves of fractional currency.

The office of Assistant Register of the Treasury was created by the act of February 20, 1863 (12 Stat., 656; Rev. Stat., 314). That officer shall perform such duties as may be devolved on him by the Register and, in the absence of the Register, shall act in his stead; and any official record, certificate, or other document, excepting warrants, bonds, and drafts, signed by the Assistant Register, shall have the same effect as if signed by the Register (Rev. Stat., 315).

In order to facilitate the proper performance of the foregoing duties, this office was divided as follows into five divisions, each under the supervision of a competent and efficient head:

- I. Receipts and Expenditures.
- II. Loan.
- III. Note and Coupon.
- IV. Tonnage.
- V. Currency.

I.—RECEIPTS AND EXPENDITURES DIVISION.

All the accounts stated by the First Auditor, Fifth Auditor, and Commissioner of the General Land Office, and revised by the First Comptroller or Commissioner of Customs, together with all warrants—pay, repay, and covering—are recorded, journalized, and posted in the books of, and subsequently filed in, this division. The duties performed by this division are:

Copying all warrants, requisitions, and other documents, of which duplicates are necessary in order to insure a more prompt and efficient dispatch of public business;

Registering and Recording all warrants, drafts, reports, and statements;

Keeping debit and credit accounts with the different disbursing officers of the Treasury Department;

Keeping ledger accounts with the various items of appropriation, crediting each appropriation with the amounts authorized by law, and debiting it with the amounts in detail drawn upon it by authority of warrants issued by the Secretary of the Treasury and countersigned by the First Comptroller;

Acting as custodian of the statements and reports, with their accompanying vouchers, and other documents, which are required by law to be preserved;

Furnishing certificates of the accounts, from the books of the office, of the balances due to or from disbursing agents;

Preparing the annual statements required by law, and also such other statements as may from time to time be required by Congress, the Departments, or the public generally, and performing such other duties as may be assigned to the Register in his official capacity as Bookkeeper of the United States.

This division has been subdivided, as follows:

1. Copying and Records.
2. Bookkeeping.
3. Files.

A detailed account of the duties of each of these subdivisions is as follows, viz:

1. COPYING AND RECORDS DIVISION.

This subdivision embraces a variety of duties.

It receives all accounts adjusted in the offices of the First and Fifth Auditors and General Land Office, after revision by the First Comptroller or Commissioner of Customs; also all warrants issued in settlement of accounts, together with those called accountable, which are issued in favor of various disbursing officers of the Government, and with which they are charged. The following are the warrants issued for these purposes: Treasury, internal revenue, customs, diplomatic, judiciary, interior civil, public debt, and quarterly salaries. To facilitate the payment of these warrants, on which the Treasurer issues drafts, copies, for the use of the bookkeepers of the personal and appropriation ledgers, are made, and the originals forwarded direct to the Treasurer's office. Accounts, as received, are stamped with current date, and examined to see if properly signed, and those on which money is to be paid, separated, and registered numerically, with amounts placed opposite the names, while the others, being principally the quarterly settlements of disbursing officers, are simply registered. The first-named accounts on which money is to be paid are copied, compared, and sent to the bookkeepers, while the copies, after receiving the certificate of the Register, or Assistant Register, that they are true, are sent to their proper destinations—the Secretary of the Treasury or the Secretary of the Interior, or as the case may be, the appropriation being the guide as to their disposition—warrants for payment being issued on these certificates.

This subdivision also furnishes the Second, Third, and Fourth Auditors with certified copies of certain miscellaneous covering warrants, issued in the settlement of accounts stated by these officers. Here are received, registered, and compared—the warrant with the requisition—all war, navy, and interior (indians and pensions) pay and repay warrants.

Registers are kept of all other warrants on which money is paid or advanced, and the drafts accompanying them are entered in books and prepared for the signature of the Register. All warrants covering money into the Treasury received from customs, lands, internal revenue, and miscellaneous sources, are recorded in this subdivision.

Quarterly statements of receipts and expenditures are prepared for the Treasurer's account of the same, requiring the entry of every pay and repay warrant issued during the quarter.

Copies of all civil settlement warrants of the previous day are daily used in checking and verifying the original entry.

2. BOOKKEEPING DIVISION.

The duties of this subdivision are keeping personal journals and ledgers and accounts to which they pertain, as follow:

The personal accounts of the different disbursing officers of the Government, after having been passed upon by the accounting officers, and certified to, either by the First Comptroller or Commissioner of Customs, are journalized from the quarterly statements of the disbursing officers.

The ledgers show at a glance the total amount due to or from each officer at the date of the last quarterly settlement, together with all advances since that period. Certificates of the balances of accounts are furnished to the auditing officers, on which all accounts are stated and adjusted.

The accounts, warrants, &c., annually recorded on these ledgers are, in round numbers, as follow:

Accounts received from First and Fifth Auditors, and Commissioner of the General Land Office	24,000
Warrants for expenditures and repayments	25,000
Warrants for receipts from customs, lands, internal revenue, and miscellaneous sources	13,000
Journal pages for entry of accounts	6,000
Number of certificates furnished for statement of accounts	14,000

Treasury Personal Ledger.

Contains the personal accounts of disbursing clerks, disbursing agents, &c., of the Government, pertaining to civil appropriations, as follow:

Disbursing Clerks, Treasury Department:

Salaries in the different bureaus (including Bureau of Engraving and Printing); Steamboat Inspection Service; Supervising Surgeon-General Marine Hospital Service; Special Inspectors of Foreign Steam-Vessels, &c.; also the various contingent expense accounts of the Treasury Department.

Disbursing Clerk, War Department:

Salaries and contingent expense accounts of the several offices of the War Department; also accounts for rent of buildings occupied by the War Department.

Disbursing Clerk, Navy Department:

Salaries and contingent expense accounts of the several bureaus.

Disbursing Clerk, Department of State:

Salaries; contingent expenses; stationery; furniture, &c.; books and maps; lithographing; &c.

Disbursing Clerk, Post-Office Department:

Salaries and contingent expense accounts; money-order office; building account; &c.

United States Army Officers in charge of public buildings and grounds:

Salaries; contingent expenses; improvement and care of public grounds; repairs, fuel, lights, &c., of executive mansion; constructing, &c., bridges, &c.; completion of Washington monument; building for State, War, and Navy Departments; Washington aqueduct; and increasing water supply.

Commissioners of the District of Columbia:

Salaries and contingent expenses; improvements, and repairs; metropolitan police; fire department; and all other accounts pertaining to disbursements for the District of Columbia.

Treasurer of the United States:

Salaries and mileage of members of the House of Representatives; interest and sinking fund on old funded debt of District of Columbia, 3.65 bonds District of Columbia; and other District of Columbia securities.

Secretary of the United States Senate:

Salaries and mileage of United States Senators; clerks to committees, pages, officers, &c.; stationery and newspapers; and all other accounts pertaining to the Senate.

Clerk of the United States House of Representatives:

Salaries of officers, employés, and clerks to committees; and all accounts of the United States House of Representatives.

Agent of the Joint Library Committee:

Increase library of Congress; salaries botanic garden; and all other library and botanic-garden accounts.

Commissioner of Agriculture:

Salaries; collecting statistics; purchase, &c., of valuable seeds; experimental garden; and all other agricultural accounts.

Public Printer:

Salaries; public printing and binding, &c.

Disbursing Agent of the United States Coast Survey:

Coast and Geodetic Survey (Eastern and Western divisions); general expenses; &c.

Assistant Treasurers of the United States:

Salaries and contingent expenses, Independent Treasury.

Superintendents of mints, &c.:

Ordinary expenses; bullion accounts; &c.

Disbursing Agents of the United States :

United States court-houses and post-offices.

Governors of Territories :

Contingent expenses.

Secretaries of Territories :

Legislative expenses.

Treasurers, &c., of charitable institutions of the District of Columbia

Sundry appropriations.

Pacific Railroad Companies :

Sundry appropriations.

Disbursing Agent, Executive Mansion :

Salaries and contingent expenses.

President of the United States :

Salary.

Librarian of Congress :

Salaries.

Disbursing Agents, Fish Commission :

Propagation of food-fishes; &c.

Disbursing Agents, National Board of Health :

Salaries and expenses.

Post-Office Department :

Deficiency in postal revenues.

Disbursing Agents, Supreme Court of the United States :

Salaries and expenses.

Disbursing Agents, Civil Service Commission :

Salaries, and traveling and incidental expenses.

Chief Clerk, Court of Claims :

Contingent expenses; &c.

Accounts of Receipts and Expenditures of the Government :

General appropriation account; bullion of gold and silver deposited; and fines, penalties, and forfeitures.

Outstanding Liabilities Ledger

Contains accounts of all parties in whose favor United States drafts have been drawn, and which have been outstanding three years, or more.

Diplomatic Personal Ledger

Contains accounts of United States ministers; consuls; commercial agents; consular clerks; secretaries of legation; interpreters and marshals to consulates; United States bankers at London, England; dispatch agents; judges, counsel, &c., of Court of Commissioners of Alabama Claims Commission; counsel, disbursing officers, &c., of French and Spanish Claims Commissions; Commission to Negotiate a Commercial Treaty with Mexico, &c.; involving expenditures from the following appropriations: salaries of ministers; salaries, secretaries of legation; salaries, consular service; salaries, consular officers not citizens; salaries, marshals for consular courts; salaries, interpreters to consulates in China, &c.; contingent expenses of foreign missions; contingent expenses United States consulates; relief and protection of American seamen; expenses of interpreters, guards, &c., in Turkish dominions; wages of keepers, &c., prison for American convicts in ———; rent of prisons, wages of keepers, &c., for American convicts in ———; rent of prison for American convicts in ———; allowance for consular clerks; rent of court-house and jail in Japan; buildings and grounds for legation in China; bringing home criminals; rescuing shipwrecked American seamen; shipping and discharging seamen; expenses under the neutrality act; annual expenses Cape Spartel light; allowance to widows or heirs of diplomatic officers who die abroad; salaries United States and Spanish Claims Commission; expenses United States and Spanish Claims Commission; publication of consular and other commercial reports; international bureau of weights and measures; international prison commission; joint commission for settlement of claims between the United States and the French Republic; international bi-metallic commission; international fishery exhibition; international congress of electricians; international commission for establishment of electrical units; salaries and expenses Court of Commissioners Alabama Claims; commission to negotiate a commercial treaty with Mexico.

The Decedents' Estates Trust-Fund Ledger

Contains personal accounts with the estates of American citizens who die abroad, and whose effects are accounted for by United States diplomatic or consular officers.

The Judiciary Personal Ledger

Contains the accounts of United States marshals, under the following appropriations, viz: fees of jurors United States courts; fees of witnesses United States courts; support of prisoners United States courts; miscellaneous expenses United States courts; fees and expenses of marshals United States courts; payment of special deputy marshals at congressional elections; fees of supervisors of elections; expenses of United States courts; and the accounts of the disbursing clerk of the Department of

Justice, under the following appropriations, viz: salaries, Department of Justice; salary warden of the jail, District Columbia; salaries employés court-house, Washington, District Columbia; stationery; furniture and repairs; books for Department library; books for office of Solicitor; horses and wagons; miscellaneous items; constructing elevator, repairing and furnishing building, Department of Justice; repairs to court-house, Washington, District Columbia; furniture and carpets court-house, Washington, District Columbia; support of prisoners United States courts; miscellaneous expenses United States courts; prosecution of crimes; defending suits in claims against the United States; support of convicts; punishing violations of intercourse acts and frauds.

The Interior-Civil Personal Ledger

Contains the accounts of receivers of public moneys acting as disbursing agents, under the following appropriations, viz: salaries and commissions of registers and receivers; expenses of depositing public moneys; contingent expenses, land offices; depredations on public timber; surveying public lands; the accounts of United States surveyors-general, under the following appropriations, viz: salaries, offices surveyors-general; contingent expenses, surveyors-general; deposits by individuals for surveying public lands; surveying private land claims; examination of public surveys; the accounts of the States of Minnesota, Arkansas, Nebraska, Wisconsin, Alabama, Mississippi, Kansas, and others, on account of five *per cent.* fund of the sales of public and Indian lands; the accounts of the disbursing clerk of the Interior Department, embracing the salary and contingent accounts of the several bureaus of that Department; United States Census; National Museum; lighting, repairs, &c., of Capitol and Capitol grounds; reconstructing Interior Department building; extension of Government Printing Office; enlarging court-house, Washington, District Columbia; support of Freedmen's Hospital and Asylum; Hot Springs, Arkansas; elevator Providence Hospital; fire apparatus, Government Printing Office and Hospital for the Insane; packing Congressional documents; depredations on public timber; surveying public lands; settlement of claims for swamp lands and swamp-land indemnity; salaries, office Architect of the Capitol, &c.; and the accounts of Superintendent Government Hospital for the Insane; of disbursing agent Columbia Institution for Deaf and Dumb; of treasurer of Howard University, District Columbia; of treasurer of Columbia Hospital for Women; of the several disbursing agents of the Geological Survey; of the several special disbursing agents of the General Land Office; of disbursing agents for United States Census; of disbursing agent of Hot Springs, Arkansas; and of Superintendent Yellowstone National Park; and miscellaneous Pacific Railway accounts.

The Customs Personal Ledger

Contains the accounts of collectors of customs; light-house inspectors; engineers, and other disbursing officers of the customs service,

under the following appropriations, viz: expenses of collecting revenue from customs; building of custom-houses and marine hospitals; revenue-cutter service; life-saving service; salaries, incidental expenses, superintendents of light-houses; marine-hospital service; repayment to importers excess of deposits; debentures and drawbacks; furniture and repairs of same for public buildings; fuel, lights, and water for public buildings; heating apparatus for public buildings; repairs and preservation of public buildings; assistant custodians and janitors of public buildings; building and repairs of light-houses; and miscellaneous appropriations incident to the customs service.

The Internal Revenue Personal Ledger

Contains accounts with collectors of internal revenue; and others acting as disbursing agents, under the following appropriations, viz: salaries and expenses of collectors of internal revenue; salaries and expenses of agents and subordinate officers of internal revenue; punishment for violation of internal revenue laws; stamps, paper, and dies; salaries and expenses of supervisors, &c., internal revenue; expenses of assessing and collecting internal revenue.

The work on this ledger includes furnishing the Fifth Auditor with certificates, on which all internal revenue disbursing accounts are stated and adjusted, and the First Comptroller with monthly reports on requisitions of collectors of all moneys advanced to them since last adjustment of accounts; also the examination and registry of all settlement accounts, on which warrants are issued, payable from internal revenue appropriations.

The Internal Revenue Stamp Ledger

Contains accounts with collectors and other agents for advances and sale of internal revenue stamps.

The Public Debt Personal Ledger

Contains the accounts of the United States Treasurer, Assistant Treasurers, and other agents, for the redemption of, and payment of the interest on, the Public Debt and bonds issued for the construction of the Pacific Railroads, accounts being opened therein with each class of loans, consols, certificates of indebtedness, and other obligations of the Government, both on account of their redemption and on account of payment of interest thereon.

Personal accounts of collections of the revenues of the Government from various sources are kept with the several Collectors of Customs duties, receivers of public moneys, collectors of internal revenue, and other officers and agents, in fourteen ledgers and two registers, as follow:

1. Customs ledger of accounts of collections of duties on merchan-

dise, and tonnage duties, together with miscellaneous receipts from bonds collected, sales of samples, surplus of sales of unclaimed merchandise, &c.

2. Customs register of the above accounts in a tabular form.

3. Customs auxiliary ledger of balances and settlement accounts of collectors out of office.

4. Customs emoluments ledger of accounts of official fees, salaries, commissions, storage, advances, &c.

5. Customs emoluments auxiliary ledger of emolument balances and settlement accounts of collectors out of office.

6. Miscellaneous customs ledger of accounts of collections of fees for inspections and examinations of steamers, and for licenses of engineers and pilots, &c.

7. Marine hospital ledger of accounts of collections of marine hospital tax.

8. Land ledger of accounts of receivers of public moneys derived from sales of public and Indian lands, fees and commissions from homestead, timber culture, warrant scrip, and other entries; transcripts of records, reducing testimony to writing, &c.

9. Land register of the above accounts in a tabular form.

10. Auxiliary land ledger of balances and settlement accounts of receivers out of office.

11. Miscellaneous land ledger of accounts of receipts of timber agents and other officers for stumpage, depredations on public lands, &c.

12. Internal revenue ledger of accounts of receipts of collectors of internal revenue from assessments, sales of stamps, &c.

13. Internal revenue auxiliary ledger of balances and settlement accounts of collectors out of office.

14. Judiciary emoluments ledger of accounts of receipts of attorneys, clerks, and marshals of United States courts.

15. Internal and coastwise intercourse ledger of accounts of receipts of special agents and other Government officers, from permit fees, &c., and from sale or rents of captured and abandoned property. (This ledger is now not in use except for occasional settlement accounts.)

16. General miscellaneous receipts ledger of accounts of receipts by any officer or agent of the Government not appropriate to either of the foregoing ledgers.

Appropriation Ledgers.

All the expenditures of the Government are detailed in these ledgers under their specific heads of appropriations, the credit side showing the balance at the beginning of the fiscal year, the appropriation authorized by law for the current year, and all amounts repaid to the appropriation account during the year, and the debit side showing in detail the names of individuals, with number and date of warrant drawn against the appropriation, the amounts carried to surplus fund, and balances on hand at close of fiscal year.

The ledgers, with the accounts to which they pertain, are as follow :

THE CIVIL, OR TREASURY, APPROPRIATION LEDGER

Contains accounts relating to the Senate and House of Representatives; Public Printer; Botanic Garden; Library of Congress; Court of Claims; salaries and expenses of the Executive office; Department of State; salaries and contingent expenses of the offices of the Treasury Department; food-fishes; Coast Survey; public buildings; assistant United States treasurers; mints and assay offices; territorial governments; District of Columbia; War Department, salaries and contingent expenses; Navy Department, salaries and contingent expenses; Post-Office Department, salaries and contingent expenses; Department of Agriculture, salaries and contingent expenses; United States Supreme, district, and circuit judges; United States district attorneys and marshals; Steamboat Inspection Service; Smithsonian Institution; and other appropriations incident to the Treasury Department.

THE JUDICIARY AND DIPLOMATIC APPROPRIATIONS LEDGER

Contains accounts relating to salaries and contingent expenses, Department of Justice; salary, warden of the jail, District of Columbia; defending suits and claims against the United States; prosecution and collection of claims; punishing violation of intercourse acts and frauds; prosecution of crimes; law libraries for the secretaries; support of convicts; expenses of territorial courts; fees of officers, jurors, and witnesses; rent and miscellaneous expenses of United States courts; international and other appropriations incident to the judiciary; salaries of United States ministers, secretaries of legation, consular service, interpreters, and marshals of consular courts; contingent expenses of foreign missions; rent of prisons and wages of keepers for American convicts; bringing home criminals; relief and protection of American seamen; rescuing shipwrecked American seamen; expenses under neutrality act; and other appropriations incident to foreign intercourse.

THE CUSTOMS APPROPRIATION LEDGER

Contains accounts relating to expenses of collecting the revenue from customs; expenses of revenue-cutter service; expenses of lighthouse establishment; furniture and repairs, fuel, lights, and water, and heating apparatus for public buildings; pay of assistant custodians and janitors of public buildings; life-saving service; compensation in lieu of moieties; seal fisheries in Alaska; standard weights and measures; building custom-houses and marine hospitals; marine-hospital service; light stations; repayments to importers of excess of deposits; debentures, drawbacks, bounties, and allowances; and other appropriations incident to customs service.

THE INTERIOR CIVIL APPROPRIATION LEDGER

Contains accounts relating to salaries and expenses, offices of Interior Department; salaries and expenses, surveyors-general and their clerks; repairs and improvement of Capitol and Capitol grounds; current expenses, and building, of beneficiary institutions, District Columbia; protection, &c., Yellowstone National Park; expenses, United States census; surveying public and private lands; repayment for lands erroneously sold; salaries, registers and receivers; depredations on public timber; five *per cent.* fund sale of public lands, and indemnity for swamp lands; and other accounts relating to interior civil service.

THE INTERNAL REVENUE APPROPRIATION LEDGER

Contains accounts relating to salaries and expenses of collectors; salaries and expenses of agents and subordinate officers; refunding taxes illegally collected; stamps, paper, and dies; punishment for violation of internal-revenue laws; and allowances or drawbacks; and other accounts pertaining to internal revenue.

THE PUBLIC-DEBT APPROPRIATION LEDGER

Contains accounts of redemptions of the various loans; payments of interest, various loans; payments of interest, Pacific railroad stock; payments of premiums on loans; and payments of discounts on loans.

THE INTERIOR (INDIANS AND PENSIONS) APPROPRIATION LEDGER

Contains accounts of fulfilling treaties with various Indian tribes; pay of Indian agents, interpreters, inspectors, and police; traveling expenses, Indian inspectors; building and repairs at agencies; contingencies, Indian department; transportation, telegraphing, and purchase of supplies; general, national, and school funds; general, national, and school funds, interest due; incidental expenses, Indian service; support of Indians; expenses of Indian Commission; removal of Indians; vaccination of Indians, &c.; army pensions; army pensions, pay and allowances; army pensions, fees of examining surgeons; army pensions, fees for vouchers; army pensions, arrears; navy pensions; navy pensions, pay and allowances; navy pensions, fees of examining surgeons; navy pensions, fees for vouchers; navy pensions, arrears; and navy pension fund; and other accounts.

THE MILITARY APPROPRIATION LEDGER

Contains accounts of pay, mileage, and general expenses, of the army; pay of military academy; bounty to volunteers; subsistence of the army; regular supplies, &c., quartermaster's department; barracks and quarters; transportation of the army and its supplies; horses, cavalry and artillery; clothing, and camp and garrison equipage; national

cemeteries; medicines and hospitals; construction and repair of hospitals; ordnance service; arsenals; fortifications; improving rivers and harbors; examinations and surveys; contingencies of the army; signal service; expenses, military convicts; military wagon roads; support, national soldiers' home; military posts; and horses and other property lost in military service; and other accounts of military establishment.

THE NAVY APPROPRIATION LEDGER

Contains accounts relating to pay and contingent expenses, navy; pay and contingent expenses, marine corps; pay and contingent expenses, naval academy; navigation bureau; naval observatory; ordnance; equipment and recruiting; yards and docks; navy-yards; medical department; provisions and clothing; construction and repairs; and steam engineering; and others.

The Receipts and Expenditures division prepares for publication in the annual report of the Register of the Treasury, a statement of about one hundred printed pages of statistics, which contains: Statement of the receipts of the Government; detailed statement of expenditures from each appropriation; amounts turned into the surplus fund, and also balances remaining unexpended; statement of outstanding principal of the public debt; statement of expenses of collecting revenue from customs; statement of expenses of collecting internal revenue; and statement of number of persons employed in each collection district, with occupation and compensation.

It also prepares for publication annually, "The receipts and expenditures of the United States"—a printed octavo volume of about six hundred pages, giving in detail the receipts from each State and district, and the name of each officer therein, and the expenditures under each head of appropriation, with the names of officers, or other persons, in whose favor such expenditures have been made, together with other statistical tables.

Here also are prepared such various other statements as may be required by Congress, the several Executive Departments, or the public generally, and bearing on all the financial operations of the Government since its establishment.

3. FILES DIVISION.

The Register of the Treasury is by law the custodian of all the civil accounts of the Government, excepting those of the Post-Office Department.

The accumulations of over a century fill three large rooms of this division, from base to ceiling, with these important records.

About two thousand of these accounts are monthly received, briefed, recorded, and filed in this division; and about the same number is withdrawn therefrom each month, by officers of the different bureaus of the Treasury Department for statement of new accounts. When thus with-

drawn, the accounts are here charged to, and receipted for by, such officers, and when returned, are again placed in the files.

Transcripts for suits are prepared and examined in this division, and certified to as true copies by the Register.

The accounts on file are all the accounts audited by the First and Fifth Auditors, and by the Commissioner of the General Land Office, and revised and certified by the First Comptroller or Commissioner of Customs, and all warrants—pay and repay—money drafts, ships' registers, &c. The accounts alone, exclusive of accompanying vouchers, number about seven hundred thousand; for a detailed statement of them reference is made to the description of the work performed in the offices of the First and Fifth Auditors and Commissioner of the General Land Office, in the Appendix, 1 Lawrence, Compt. Dec.

II.—LOAN DIVISION.

The issue, transfer, and redemption of the Government securities have always formed an important branch of the business of the Register's office. It assumed colossal proportions by the rapid increase of the public debt, and made imperative the present organization of this branch as a separate and distinct division. The details of its principal duties are as follow:

1. Issuing United States bonds—coupon and registered—included in original issues, converting coupon into registered bonds, and transferring United States bonds.

2. Journalizing in detail the issues and redemptions of such bonds.

3. Keeping a ledger account with each holder of registered bonds.

4. Keeping a general account of issues and redemptions for each loan.

5. Keeping a register of all transfer authorities.

6. Keeping a record of caveats against transfers of lost or stolen bonds.

7. Keeping numerical registers of issues and transfers of loans.

8. Declaring dividends of interest, at the respective periods of payment, on the different loans.

9. Conducting correspondence connected with the issue of bonds, and that of a miscellaneous character, and copying same.

10. Filing and binding letters, canceled registered bonds, and various vouchers of issue.

For the purposes of issue, blank coupon and registered bonds, properly prepared, are furnished the Register, on his requisition to the Secretary, which blank bonds are numbered in numerical order, each denomination having a separate sequence. The original issues of a loan are made upon certificates of the United States Treasurer that the payee has deposited a specified amount, for which he requests a return in United States bonds. These certificates of deposit are filed in this office as vouchers for the issue to the subscribers, and represent the amount authorized and outstanding.

The general account of a loan is its cash account, and shows, as debits, the issues upon warrants, exchanges, and transfers, and, as credits, the certificates surrendered in transfer and actual redemption. Coupon bonds are issued to bearer, pass by delivery, and are convertible into registered bonds by being sent to the Treasury Department for exchange. The coupon bonds so exchanged, after the proper journal entries, are transmitted to the note and coupon division. Registered bonds to be transferred must be regularly assigned, and transmitted to the office of the Register for issue of new bonds to the purchaser. When received in this office, examination is first made to see if caveats are entered against the transfer, and that the assignments have been properly executed. If assigned by an attorney, administrator, &c., or by corporate officers, reference is made to the record of transfer powers; and, if the party is duly authorized, the bond is stamped "authority on file," and reissued. This "Record of Authorities" is a very important one, and requires great care in its entries, as it applies not only to bonds transferred, but to all received for redemption; and the stamp as described is accepted as evidence of correctness by all the accounting officers. In the issue upon a transfer, the old bonds are canceled and new ones inscribed in the name of the assignee; and the transaction is journalized in detail, debiting the bonds surrendered, and offsetting by the reissue. As a check upon this division, both sets of bonds are then passed to the Division of Loans and Currency of the Secretary's office, and are there examined and entered upon numerical registers; and the new bonds, after receiving impress of the seal of the Treasury Department, are returned to the Register for his signature, and the old bonds are canceled and bound in suitable books as vouchers. All bonds redeemed are also preserved in like manner, so that, ultimately, every registered bond sent out is returned, and every transfer transaction, from first to last, is readily ascertained.

A ledger account is opened with each holder of registered bonds, in which he is credited with the issue, by date, number, and amount, and debited in like manner with such bonds as he may transfer.

One of the most important factors in the work of this division is the preparation of the interest schedules, representing the credit ledger balances to each holder at any particular period of payment. Up to 1870, a written schedule for each separate loan was sent to the different pay agents; during that year a consolidated schedule was adopted and printed, so that the payees receipted under one signature for interest on amounts they might hold in the several loans.

All interest now is payable by check prepared from abstracts furnished the United States Treasurer by this office. This mode was pursued with the issue of the five *per cent.* funded loan of 1881, and has been applied to all succeeding series.

On the four *per cent.* loan some sixty thousand of these checks are prepared, each quarter, from a printed abstract of some three thousand

pages. The other existing loans, in aggregate, call for about twenty-five thousand checks, each quarter; making, at the present time, over three hundred thousand checks sent out during the year. As an evidence of the extent of bookkeeping demanded in the work of this division, it may be mentioned that since 1861 three hundred and forty-three ledgers and one hundred and sixteen journals have been used; and, during the same period, six millions of coupon and registered bonds were issued, and some five millions canceled, and the amount represented was respectively, in round numbers, eight billions and six billions of dollars.

III.—NOTE AND COUPON DIVISION.

The Note and Coupon Division was organized June 30, 1864, to supply a ready and accurate means of information in regard to the individual and collective redemption of all coupon bonds, coupons, certificates of indebtedness, interest-bearing Treasury notes, gold certificates, etc.

Records are kept, in which each note, bond, coupon, and certificate is entered, so as to indicate the redemption of the same; the records also showing by number those outstanding in any particular issue.

These securities are all carefully examined and arranged by loan, denomination, and number; and, after registration, the coupon bonds and interest notes are destroyed, but the redeemed coupons, gold certificates, and certificates of indebtedness are retained and placed on file in this division.

This is the only division in the Treasury Department where a record is kept of redeemed coupons, by loan, denomination, date of maturity, and number.

There were, up to April 15, 1883, 85,779,101 coupons on file amounting to \$1,134,781,378.08.

By the system of accounts used, any particular coupon, which has been redeemed, can be produced at a moment's notice, and information can be given in any case if a coupon is paid or not. Whenever payment of a coupon is refused by any assistant treasurer of the United States on account of the mutilation of the same through the loss of its date or number, by reference to the books the necessary information is given by which such coupon can be paid.

This division is also the final depository for all interest checks issued by the Department in payment of interest on registered bonds.

A record is made of them, as of notes, bonds, coupons, etc., and they are then placed on file for reference.

Schedules are prepared of redeemed and exchanged coupon bonds, showing in detail the amount of each case, by loan and denomination, and the number of coupons attached to each bond, and accompany the bonds in their transmittal to the destruction committee.

Pursuant to departmental order, dated September 6, 1866, a schedule is prepared in like manner, of each account of redeemed coupons, which

is retained in this division. An account is also kept, in addition to the numerical registers, showing the number and amounts redeemed and outstanding, in aggregate, of all classes of securities coming to this division.

The redeemed and exchanged coupon bonds are received from the Loan Division of this office, and coupons, interest notes, gold certificates, certificates of indebtedness, and interest-checks, from the First Comptroller's Office.

There are six hundred and sixty-five books used in this division for the purposes of record and account.

The following is a detailed statement of the work performed therein:
Account and record:

1. Of redeemed, exchanged, or transferred coupon bonds, issued under acts as follow:

Acts of April 15, 1842 (5 Stat., 473); March 3, 1843 (*Id.*, 614); March 31, 1848 (9 Stat., 217); September 9, 1850 (*Id.*, 447); June 14, 1858 (11 Stat., 365); June 22, 1860 (12 Stat., 79); February 8, 1861 (*Id.*, 129); March 2, 1861 (*Id.*, 198); July 17, 1861 (*Id.*, 259); July 17 and August 5, 1861 (*Id.*, 259, 313); February 25, 1862 (*Id.*, 345); March 3, 1863 (*Id.*, 709); March 3, 1864 (13 Stat., 13); June 30, 1864 (*Id.*, 218); June 30, 1864, and March 3, 1865 (*Id.*, 218, 468); March 3, 1865 (*Id.*, 468); July 14, 1870, and January 20, 1871 (16 Stat., 272, 399, 5 per cent. loan of 1881, 4½ per cent. loan of 1891, 4 per cent. consols of 1907); May 11, 1874 (18 Stat., 43, Louisville and Portland Canal stock); and June 20, 1874, and February 20, 1875 (*Id.*, 120, 332, 3.65 per cent. bonds, D. C.).

2. Of redeemed coupons, as follow:

All the coupons from loans enumerated above; and from loans authorized by acts of Congress of March 3, 1863 (12 Stat., 710, 2-year 5 per cent. Treasury notes); July 8, 1870 (16 Stat., 197, certificates of indebtedness); July 27, 1868 (15 Stat., 226, D. C. stock, 10-year Bowen); May 8, 1872 (17 Stat., 86, D. C. stock, 20-year funding); and June 10, 1879 (21 Stat., 9, D. C. stock, 20-year funding); and by acts of the legislative assembly of the District of Columbia of July 10 and December 16, 1871 (6 per cent. permanent improvement); June 23 and 25, 1873 (7 per cent. permanent improvement); July 20, 1871, and June 26, 1873 (water stock); August 23, 1871, and June 19, 1872 (market-stock); June 20, 1872 (30-year funding); and June 26, 1873 (steam-force pump).

3. Of certificates of indebtedness issued under acts as follow:

Acts of March 1, 1862 (12 Stat., 352); March 2, 1867 (14 Stat., 558); July 8, 1870 (16 Stat., 197); and June 8, 1872 (17 Stat., 336).

4. Of interest-bearing Treasury notes, issued under act of March 3, 1863 (12 Stat., 710, 1-year and 2-year notes—and 2-year notes, coupon).

5. Of gold certificates issued under act of March 3, 1863 (12 Stat., 711).

6. Of interest checks, in payment of interest on registered bonds issued under acts and ordinances as follow :

Acts of Congress of July 17 and August 5, 1861 (12 Stat., 259, 313); March 3, 1863 (*Id.*, 709); July 14, 1870, and January 20, 1871 (16 Stat., 272, 399, 5 per cent. loan of 1881, 4½ per cent. loan of 1891, consols of 1907); June 20, 1874, and February 20, 1875 (18 Stat., 120, 332, 3.65 per cent. bonds, D. C.); June 10, 1879 (21 Stat., 9, D. C. stock, 20-year funding); July 1, 1862 (12 Stat., 492, Pacific R. R. stock); and July 2, 1864 (13 Stat., 359, Pacific R. R. stock); acts of the legislative assembly of the District of Columbia of August 23, 1871, and June 19, 1872 (market-stock); ordinances of the corporation of Washington of August 19, 1828 (registered-general stock); October 25, 1843 (registered-general stock); and April 14, 1847 (Chesapeake and Ohio Canal stock); and ordinances of the corporation of Georgetown of ———, ——— (general stock—no copy of this ordinance can be found); January 9, 1864 (market-stock); September 24, 1864 (bounty-stock); and May 12, 1871 (general-stock).

IV.—TONNAGE DIVISION.

The Tonnage Division was organized at the time the office of the Register of the Treasury was created.

Its duties, in general, are to record all marine documents issued to merchant vessels of the United States by the collectors and surveyors of customs, and to examine the tonnage accounts returned by such officers.

Vessels of the United States are those of five tons burden and upwards, possessed of certificates of registry, enrollments and licenses, or licenses, regularly and legally issued and in force (Rev. Stat., 4131, 4311, 4320).

Vessels built within the United States and belonging wholly to citizens thereof, and vessels which may be captured in war by citizens of the United States and lawfully condemned as prize, or which may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by citizens, and no others, may be registered (Rev. Stat., 4132).

All documents issued to merchant vessels of the United States subsequently to 1814 (all issued previous to that date were destroyed by the British) and surrendered, are now on file in the Register's Office, and an abstract of each is entered in the books of the Tonnage Division.

The marine documents recorded are divided into the following classes, viz:

1. Registers, which are those documents issued to vessels bound to a foreign port. All registers are signed by the Register of the Treasury, the collector of customs where the document is issued, and the naval officer (if there be one).

2. Enrollments, which are those documents issued to vessels of twenty tons' burden, or over, engaged in domestic commerce. On the Northern,

Northeastern, and Northwestern frontiers enrollments are also issued to vessels under twenty tons' burden.

Each enrolled vessel is also required to carry a license. Enrollments are signed by the collector of customs, and naval officer (if there be one).

3. Licenses, which are permits to engage in certain trades. They are subdivided into two classes, viz:

(1) Licenses issued to enrolled vessels.

(2) Licenses issued to vessels under twenty tons.

4. Commissions to yachts, which are those documents issued to yachts belonging to any regularly organized and incorporated yacht club for voyages of pleasure (Rev. Stat., 4217).

5. Certificates of record, which are those documents issued to vessels built in the United States, and belonging wholly or in part to the subjects of foreign powers (Rev. Stat., 4180, 4181, 4182).

The following books are required in order to properly record the different classes of marine documents:

1. RECORD BOOKS.

Since 1868 every vessel is entitled, on application to the Secretary of the Treasury, to have a number assigned to it. In the record books these numbers are arranged in regular order, and opposite each number is entered the name of the vessel to which the number belongs, together with its tonnage and the documents which have been issued to it.

2. REGISTER, ENROLLMENT, AND LICENSE BOOKS.

These books contain the names of all the customs ports of the United States, and the number and name of each vessel to which a document has been issued during the year.

3. MARGIN BOOKS.

These books contain a record of marginal notices, sent to collectors of customs, of the surrender at other ports of documents issued by them. In these books are entered the number of each document which has been surrendered at a port other than the port of issue, the name of the vessel and its tonnage, and the place, time, and cause of surrender.

4. VESSELS BUILT BOOKS.

This book contains a statement of all vessels built; their class, number, and tonnage, the materials of which built, and the port of construction.

5. VESSELS WRECKED, ABANDONED, OR LOST BOOK.

This book contains an account of all vessels wrecked, abandoned, or lost; their names and numbers, and the ports at which their last documents were issued.

6. SOLD FOREIGN BOOK.

This book contains the names and numbers of vessels sold to foreign countries.

7. NAMES CHANGED BOOK.

The act of March 2, 1881 (21 Stat., 377), authorizes the Secretary of the Treasury to change the name of vessels under certain circumstances. In this book a record is kept of all vessels whose names have been changed under this act.

The keeping of the tonnage accounts is one of the most important duties of the Tonnage Division.

Each collector and surveyor of customs is required to make a quarterly return to the Register of the Treasury of all vessels documented by him. These returns contain the class and number of documents, and the names and tonnage of the vessels documented.

As will be seen from the following, a perfect system of accounts is kept, the tons and hundredths of tons taking the place of dollars and cents in money accounts.

On the issue of every marine document an entry is made by the officer of customs, on the debit side of the quarterly abstract, giving the number and date of the document, the vessel's name, the previous document, and the tonnage.

A corresponding entry is made on the credit side, on the surrender of the same document.

As it is very evident that all documents issued at a port will not be surrendered at the same port, some provision has to be made by which the port of issue may be informed of such surrender:

This is accomplished by means of "margins." On the surrender of a document at a port other than the port of issue, a monthly abstract, together with the surrendered papers, is sent to the Register of the Treasury. An entry of each surrendered paper is made in the margin books of this division, and a marginal notice is sent to the collector at the port where the document is issued, stating that the therein-named document has been surrendered, and requesting him to credit the same on his next quarterly abstract.

At the close of the fiscal year, each collector of customs sends to the Register of the Treasury an alphabetical list of all vessels to which documents have been issued by him at any time, and by which such documents have not been surrendered. The tonnage, as shown by this list, must agree with the tonnage outstanding, as shown by the quarterly abstract.

V.—CURRENCY DIVISION.

The following duties, pertaining to the redemption and destruction of worn and mutilated United States notes, gold and silver certificates, fractional currency, and other money securities of the United States, and to the destruction of all such securities of the United States—includ-

ing revenue stamps—as have been found mutilated or imperfect in the process of manufacture before being put into circulation, are performed by this division:

The authority to redeem and destroy the above-named money securities of the Government is derived from the act of March 17, 1862 (12 Stat., 370, sec. 4). The regulations governing their destruction require that they shall first be counted and assorted, by series and denominations, in the Treasurer's office, where they are put in small packages, arranged in regular order according to series and denomination, of either fifty or one hundred notes each, and strapped by the counter lengthwise and across; the date of the counting, the amount contained in the package or strap, the number of the case showing from whom received, and the name of the counter is noted upon the strap. They are then canceled, in the presence of the counter, by punching four crescent-shaped holes through each package, two near each end, about an inch apart; these are then put into bundles or packages of ten or twenty packages each, and lettered A., B., C., or D.—each sub-package being numbered from one to ten, or twenty, as the case may be; the packages of notes and certificates, thus lettered and numbered, are then cut in two, lengthwise, and put up into bundles or lots of four thousand half notes each, there being one thousand half notes in each of the packages lettered as stated. The upper halves of the notes, thus prepared and cut in two, are delivered by the Treasurer to the Register of the Treasury, and the lower halves, to the Secretary. The fractional currency is cut into right and left halves, the right being sent to the Register and the left to the Secretary.

The halves, so sent to the Register's office, are recounted and examined by the Currency Division (those sent to the Secretary's office being recounted and examined there), for the discovery of any errors that may have occurred in the first count, or the existence of counterfeits that may have escaped detection. If a hundred half note package is found by the recounter to contain less than one hundred halves, any number over, a note of any other series than that of the lot, or a counterfeit, the label of the package is taken off, the shortage, excess, wrong series, or counterfeit, which has been discovered, is noted on it, and such label, with the notes representing such excess, wrong series, or counterfeit, is returned to the Treasurer for correction. If any error, discovered in the recount of either of these halves by one office, has escaped detection in the other, the labels sent to the Treasurer by the office of the discoverer enable the other office without delay to re-examine and find its corresponding half. A record of the count and of the errors found is kept in both of the recounting offices, and by them reported to the Treasurer. When all three offices, after discovery, correction, and report of errors, agree as to their count, the Treasurer notifies the Register and Secretary of such fact. Then the money is canceled by punching another hole through each end; after which it is destroyed by being placed in a macerator of

the Bureau of Engraving and Printing, in which, by the action of steam, alkalies, and knives, it is reduced to a pulp. This macerator is fastened by three different locks, the keys of which are separately kept by the three members of the committee who witness the destruction, and it cannot be opened except when the three members of the committee are present. In addition to these three official witnesses, each representing one of the above-named offices, a citizen, specially appointed by the Secretary, is also present at these destructions, as a witness for the people. After the destruction is completed, a certificate setting forth the fact, and signed by each of the witnessing committee, is furnished to the Secretary, the Register, and the Treasurer; whereupon the Government redeems the loss thus occasioned, and reimburses the latter officer, by reissue of the amounts of the securities so destroyed.

Besides witnessing the destruction of securities that have been in circulation, this committee also witnesses the destruction of all such—including revenue stamps—as have been found mutilated or imperfect in the process of manufacture, and which have likewise been previously examined and counted by a committee appointed for that purpose, and selected from offices of the Secretary, Treasurer, Register, and Commissioner of Internal Revenue, which committee, so selected, keeps a tabulated statement recording the number of sheets destroyed, their character, value, and denomination, and such other data as are held to be necessary in connection therewith.

IN THE MATTER OF THE RIGHT OF A REPRESENTATIVE IN CONGRESS AFTER HE HAS TAKEN THE OATH AS SUCH AND ENTERED ON HIS DUTIES AT A SESSION, TO BE PAID FOR SERVICES AS ATTORNEY RETAINED UNDER SECTION 363 OF THE REVISED STATUTES.—CROWLEY'S CASE (ANTE 355–361.)

1. The retainer by the Attorney-General, under section 363 of the Revised Statutes, of an attorney to assist a district attorney does not constitute a "contract" within the meaning of section 3739 of the Revised Statutes.
2. *Semble*, That the acceptance of such retainer does not constitute an "office" within the meaning of the last clause of article 1, section 6, of the Constitution.
3. The acceptance by a Senator or Representative in Congress of any office under the United States, *after* such Senator or Representative *has taken the oath* of office (14 Op. Att. Gen., 407) as such and entered on its duties, operates as a forfeiture of his seat.
4. Continuing to execute the duties of an office under the United States after one is elected to Congress, but before he takes his seat, is not a disqualification, such office being resigned or extinct prior to the taking of the seat. (See *Hammond v. Herrick*, Cl. and Hall, 287; *Earl's case*, *Ib.*, 314; *Munford's case*, *Ib.*, 316; *Schenck and Blair's case*, Thirty-eighth Congress, &c.)
5. But the question, whether when a Representative in Congress is retained as an attorney for the United States his agency as such attorney is an office, is one for the House of Representatives to decide, and not generally for the accounting officers. (Const., art. 1, sec. 5.) If it be an office that fact does not interfere with his right to the compensation fixed by the Attorney-General for services under his retainer, since its acceptance is a resignation of the office of Representative.
6. A department charged with the execution of particular authority, business, or duty has always been deemed incidentally to possess the right to employ the proper persons to perform the same when the law has not specified the persons to perform it.
7. He is not a *member* of Congress, nor one who "holds any office under the Government of the United States," who has only been elected to the House of Representatives, but who has never taken any oath of office nor entered upon the duties of that position.
8. An acting member of Congress is an officer of this Government within the sense of at least some of the clauses of the Constitution.
9. Whatever may be the meaning of the words "office under the United States," as used in the Constitution, they, in the act of August 31, 1852 (Rev. Stat., 1763), ought to be held to, and do, preclude an *acting* member of Congress from receiving compensation for the duties of any other office.
10. When a member-elect of Congress has drawn the salary or pay for any other office for any time after the 4th of March preceding his entering upon his duties as a member of Congress he should not receive any compensation as a member of Congress for that time.
11. The act of 31st August, 1852 (1 Brightly, 821; 10 Stat., 100; Rev. Stat., 1763), does not apply to "duties" or services for which there was no officer provided by law whose duty it was to discharge them, and which duties were, in their nature and in law, such that "some other person" than an officer might legally discharge them.
12. The law, or regulations in pursuance of law, may confer upon private individuals not officers powers similar to those usually exercised by officers, such as that of issuing subpoenas, swearing witnesses, &c. Such is common in regulations touch-

ing elections, special commissions, the duties in some of the States of attorneys, of grand jurors, and the like. These conferments of such temporary or limited powers do not, in the sense of the Constitution and laws of the United States, necessarily constitute the recipient of them "officers" nor make their duties those of "any office."

In this case it was decided, *ante* 355, that "the inhibition in section 1765 of the Revised Statutes against the payment to any officer or other person of any additional pay, extra allowance, or compensation does not apply to a Representative in Congress." This was the question submitted for the decision of the Comptroller. The case itself presents *other questions* which were not overlooked, to some of which it is deemed proper to refer.

The *services* were rendered after the Representative had taken the requisite oath as such, and entered on his duties at a session, but in a subsequent recess of Congress.

1. The Revised Statutes contain the following sections:

SEC. 3739. No member of or Delegate to Congress shall directly or indirectly, himself, or by any other person in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement made or entered into in behalf of the United States, by any officer or person authorized to make contracts on behalf of the United States. Every person who violates this section shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars. All contracts or agreements made in violation of this section shall be void; and whenever any sum of money is advanced on the part of the United States, in consideration of any such contract or agreement, it shall be forthwith repaid; and in case of refusal or delay to repay the same, when demanded, by the proper officer of the Department under whose authority such contract or agreement shall have been made or entered into, every person so refusing or delaying, together with his surety or sureties, shall be forthwith prosecuted at law for the recovery of any such sum of money so advanced.

SEC. 3740. Nothing contained in the preceding section shall extend, or be construed to extend, to any contract or agreement, made or entered into, or accepted, by any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company; nor to the purchase or sale of bills of exchange or other property by any member of [or delegate to] Congress, where the same are ready for delivery, and payment therefor is made, at the time of making or entering into the contract or agreement.

SEC. 3741. In every such contract or agreement to be made or entered into, or accepted by or on behalf of the United States, there shall be inserted an express condition that no member of [or delegate to] Congress shall be admitted to any share or part of such contract or agreement, or to any benefit to arise thereupon.

SEC. 3742. Every officer who, on behalf of the United States, directly or indirectly makes or enters into any contract, bargain, or agreement in writing or otherwise, other than such as are hereinbefore excepted, with any member of [or delegate to] Congress, shall be deemed guilty of a misdemeanor, and shall be fined three thousand dollars.

The agency of Mr. Crowley by his retainer under sections 363 and 366 of the Revised Statutes, was exerted either by (1) *contract*, or (2)

by appointment to an *office*, or (3) under an employment by the Attorney-General to assist the district attorney and without all the attributes of *any contract* mentioned in the sections above quoted.

Attorney-General Williams, in an opinion, June 6, 1874 (14 Opinions, 408), in a similar case said that “whether * * * said agency was an ordinary professional employment or an office is, perhaps, questionable.” It is clear that such agency does not arise upon *such contract* as is inhibited by section 3739 of the Revised Statutes. The act of April 21, 1808 (2 Stat., 484), from which this section is taken, shows that it relates to contracts of a different character. Thus it provides:

SEC. 5. That from and after the passing of this act it shall be the duty of the Secretary of the Treasury, Secretary of War, Secretary of the Navy, and the Postmaster-General annually, to lay before Congress, a statement of all the contracts which have been made in their respective Departments, during the year preceding such report, exhibiting in such statement the name of the contractor, the article or thing contracted for, the place where the article was to be delivered, or the thing performed, the sum to be paid for its performance or delivery, the date and duration of the contract.

This provision, *noscitur à sociis*, shows the character of the contracts contemplated. And the construction stated is settled by usage and the universal understanding in every department of Government.

Hence the sections above quoted from the Revised Statutes do not interfere with the right of the claimant to compensation for his services under the retainer of the Attorney-General.

II. The Constitution, article 1, section 6, provides that “no person holding any office under the United States, shall be a member of either House during his continuance in office.”

It is well settled that the acceptance by a Senator or Representative in Congress of any *office* under the United States, *after* such Senator or Representative *has taken the oath* of office (14 Opinions, 407), as such operates as a forfeiture of his seat. (Paschal Annotated Const., 3d ed., 90; Van Ness' case, Cl. & Hall, 122; Yell's case, in 1846–'7; Hammond v. Herrick, Cl. & Hall, 287; Earle's case, *Id.*, 314; Mumford's case, *Id.*, 316.) But the question whether Mr. Crowley's agency as attorney is an *office* is one for the House of Representatives to decide, and such question is not generally for the accounting officers; but in some cases it may be. (Const., art. 1, sec. 5.)

If it be an *office*, that fact does not interfere with Mr. Crowley's right to the compensation fixed by the Attorney-General, since its acceptance vacated his right to a seat as Representative. It would seem, however, that the agency of an attorney so retained is not an office. It does not fall within the approved definition of an office. (United States v. Hartwell, 6 Wall., 385; United States v. Moore, 95 U. S., 762; United States v. Germaine, 99 U. S., 511.)

These and other similar questions have been elsewhere fully discussed.

In a report, No. 93, made July 14, 1866, to the House of Representatives, at the first session of the Thirty-ninth Congress, and in the debates which preceded it in the House, April 30, 1866 (Congressional Globe, vol. 71, part 3, first session Thirty-ninth Congress, page 2296, &c.), there is much valuable information on questions similar to those above considered. It appeared that a person was elected in November, 1864, as a Representative in Congress with a term commencing March 4, 1865, but without any session of Congress until that which commenced in December, 1865, when the member-elect took the oath required by law. Between April 3 and December, 1865, the member-elect rendered services in his professional capacity as an attorney at law for the United States in the prosecution before a court-martial of Major Haddock, Acting Provost Marshal-General, for which service the Government paid such attorney a reasonable compensation. On the questions of law involved in this retainer, service, and payment the report says:

The only * * * question * * * to be considered is, whether there was any legal impediment in the way of * * * a member elect of the Thirty-ninth Congress, assuming the relation he did assume to the prosecution of Haddock. The committee have sought carefully to inquire whether there was any such legal impediment.

RIGHT OF DEPARTMENTS TO EMPLOY AND PAY AGENTS.

In determining upon this question, it seems perfectly safe to assume that what is said by the Supreme Court of the United States, in *Gratiet v. United States*, 15 Peters, 371, is the settled law applicable to this class of cases, to wit, that "a Department charged with the execution of particular authority, business, or duty has always been deemed incidentally to possess the right to employ the proper persons to perform the same." * * * "And also the right, when the service or duty is an extra service or duty, to allow the person so employed a suitable compensation." "This doctrine is not new," says the Supreme Court, "but is fully expounded in the cases of the *United States v. Riley*, 7 Peters, 18, and the *United States v. Fillebrown*, 7 Peters, 28." And the court adds: "that in order to justify a refusal to allow such compensation, it is indispensable to show that there is some law which positively prohibits, or by just implication denies, any allowance of such compensation." This was said by the court in a case where it was an officer of the United States who was claiming the compensation for services outside of his salary.

THE PROHIBITIONS.

We assume, then, that there is nothing in the *general* relations of a member elect of Congress to his Government, nor in the *general* principles of the law growing out of that relation, which would forbid * * * [the member elect] becoming the agent or attorney of the Government, and receiving compensation therefor; and that if his relations to the Haddock trial were illegal, it must be owing to some express provision of the Constitution or of the law. Is there any such legal prohibition? The legal provisions which have been brought to the attention of the committee, and which are supposed to have some bearing upon the ques-

tion of the legality of * * * [the member's] relations to the Haddock trial, and his compensation therefor, are the following :

1. The Constitution (art 1, sec. VI) declares that “No person holding an office under the United States shall be a member of either House during his continuance in office.”

2. The eighteenth section of the act of 31st August, 1852 (1 Brightly, 821), provides that “No person hereafter who holds or shall hold any office under the Government of the United States, whose salary or annual compensation shall amount to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duty of any other office.”

3. The third section of the act of 3d March, 1839 (5 United States Statutes, 349, and 1 Brightly, 820), which reads as follows: “No officer in any branch of the public service, or any other person, whose salaries, or whose pay or emoluments is or are fixed by law or regulations, shall receive any extra allowance or compensation in any form whatever for the disbursements of public money or the performance of any other service, unless the said extra allowance or compensation be authorized by law.”

4. The second section of the act of 23d August, 1842 (5 United States Statutes, 510, and 1 Brightly, 820), which reads as follows: “No officer in any branch of the public service, or any other person, whose salary, pay, or emoluments is or are fixed by law or regulations, shall receive any additional pay, extra allowance or compensation in any form whatever, for the disbursements of public money or other service or duty whatever, unless the same shall be authorized by law and the appropriation therefor explicitly set forth that it is for such additional pay, extra allowance, or compensation.”

5. The twelfth section of the act of 26th August, 1842 (1 Brightly, 821; 5 United States Statutes, 525), which reads as follows: “No allowance or compensation shall be made to any clerk or other officer by reason of the discharge of the duties which belong to any other clerk or officer in the same or any other Department; and no allowance or compensation shall be made for any extra service whatever which any clerk or other officer may be required to perform.”

6. The first section of the act of 30th September, 1850 (1 Brightly, 821; 9 United States Statutes, 542), which reads as follows: “The proper accounting officer of the Treasury, or other pay officers of the United States, shall in no case allow or pay to one individual the salaries of two different offices on account of having performed the duties thereof at the same time. But this prohibition shall not extend to the superintendents of the public buildings.”

7. The first section of the act of April 21, 1808 (1 Brightly, 190, and 2 United States Statutes, 484), which reads as follows: “No member of Congress shall, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement hereafter to be made or entered into with any officer of the United States in their behalf, or with any person authorized to make contracts on the part of the United States; and if any member of Congress shall, directly or indirectly, himself, or by any other person whatsoever in trust for him, or for his use or benefit, or on his account, *enter into, accept, or agree for or undertake or execute any such contract or agreement*, in whole or in part, every member so offending shall, for every such offense, upon conviction thereof before any court of the United States or the Territories thereof having cognizance of such of-

fense, be adjudged guilty of a high misdemeanor, and shall be fined three thousand dollars; and every such contract or agreement as aforesaid shall, moreover, be absolutely void and of no effect."

8. The first section of the act of June 11, 1864 (2 Brightly, 105, and 13 United States Statutes, 123), which reads as follows: "No member of the Senate or House of Representatives shall, after his election and during his continuance in office, nor shall any head of a Department, head of a bureau, clerk, or other officer of the Government, receive or agree to receive any compensation whatsoever, directly or indirectly, for any services rendered or to be rendered, after the passage of this act, to any person, either by himself or another, in relation to any proceedings, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or directly or indirectly interested, before any Department, court-martial, bureau, officer, or any civil, military, or naval commission whatever; and any person offending against the provisions of this act shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding ten thousand dollars, and by imprisonment for a term not exceeding two years, at the discretion of the court trying the same, and shall be forever thereafter incapable of holding any office of honor or trust or profit under the Government of the United States."

THE CONSTITUTIONAL PROHIBITION.

These are all of the existing laws * * * which are supposed to contain anything bearing, either nearly or remotely, upon the matter of this service of * * * [the member] being prohibited by law. There are other laws which bear upon other points in this inquiry, which will be alluded to.

With these provisions of the Constitution and law before us, and assuming as law that which we have above stated from the case of *Gratiot v. The United States* (15 Peters, 371), we inquire whether any of these provisions of express law do away with that general principle as applicable to the matter before the committee; or whether either of these provisions prohibit or render illegal what was done by * * * [the member] in the Haddock trial, he being a member-elect of the Thirty-ninth Congress.

To avoid, if we can, confusion, we first consider this without reference to the question whether * * * [the member] should be paid, as a member of the Thirty-ninth Congress, for the same time covered by his service in the Haddock trial, and for which time it is suggested he was paid by the fee of three thousand dollars, and let the inquiry be first disposed of whether it was illegal for * * * [the member] to assume that service and take compensation therefor.

And, in disposing of this inquiry, let it first be granted that * * * [the member], in what occurred in that service, became and was a "judge-advocate," in the strictest sense, and that he was thereby made an officer of the United States, and was not a mere agent and counsel of the Government.

In entering upon this inquiry the committee do not forget the truth nor the supreme importance of that principle of our Government which was pressed upon the attention of the committee in the argument of this case, and which received, during the Thirty-eighth Congress, the sanction of this House in its approval of the report in the cases of Robert C. Schenck and of Francis P. Blair. The principle to which we allude is thus stated in that report:

"Nothing is plainer in the theory and plan of this Government than

the distinct and separate organization of the executive, judicial, and legislative departments, and the sedulous care with which each has been clothed and guarded in the exercise of duties entirely independent of the others. Yet the attempt to invest the same person with two offices, one legislative and the other executive, and require of him at the same time the discharge of the duties of both, is, whether they be conflicting or not, a commingling of the duties of the executive and legislative departments. It is bringing the Executive himself into the very halls of Congress, and, if persisted in, might ultimately prove as pernicious as if he had a seat therein, and as many votes as he had commissions. If one Representative in Congress may at the same time hold under the Executive the office of major-general, so may another, and another may as well be a brigadier-general, or hold any other official position in the military service under the Executive and Commander-in-Chief, and bound to obey him. By such process the House may at any time be put under the control and become the pliant instrument of the Executive to any end. Its members would cease to be the representatives of the people, and become only the agents of the Executive."

The framers of the Constitution saw this so clearly, and felt the independence of the legislative over the executive department was so essential and vital, that they deemed the inhibition worthy of an express constitutional enactment, that "no person holding any office under the United States shall be a member of either House during his continuance in office." (Art. 1, sec. VI.)

Still, in view of this important principle, the committee have not been able to see how the acceptance and discharge of the duties of the office of judge-advocate by * * * [the member], the duties, tenure, and existence of which office (if such it was in him) were in their nature such as would most likely be, and were in fact, wholly ended and gone before he was, by law or the Constitution, required to qualify as a member of Congress, or to enter upon, assume, or discharge any duty as such, conflicted with these principles. Upon this subject-matter the committee deem the following two propositions to be entirely settled in our Government: 1. "The acceptance by a member of any office under the United States, after he has been elected to, and has taken his seat in Congress, operates as a forfeiture of his seat." (See Van Ness' case, and Cl. Hall, 122; Schenck and Blair's case, Thirty-eighth Congress, &c.) 2. "Continuing to execute the duties of an office under the United States after one is elected to Congress, but before he takes his seat, is not a disqualification, such office being resigned or extinct prior to the taking of the seat." (See Hammond v. Herrick, Cl. and Hall, 287; Earl's case, *Ibid.*, 314; Munford's case, *Ibid.*, 316; Schenck and Blair's case, Thirty-eighth Congress, &c.)

[We] * * * agree with the reasoning and conclusions of the report, from which we have already quoted, that the *continuance to hold* another office after the time when the law and Constitution require the member elect to qualify and enter upon the discharge of his duties as a member, is, in legal contemplation, an act of election by him to vacate his office as a member; and such *continuance to hold* the other office is equivalent, in its legal significance, to the act of *accepting* and entering upon an office tendered after the member was qualified. Both alike vacate the legislative office. The act, therefore, of * * * [the member-elect] in *accepting* an office not previously held, which, from its nature, would terminate before he would be required to assume any duty as a member, had no more nor less effect in depriving him of his right to enter upon his

office as a member of Congress than the act of continuing, after he was elected, to exercise the duties of an office which he had previously entered upon would have. Neither operates to vacate his seat in this house, the first office being such as must be and was wholly ended or abandoned before the time comes when he is required to enter upon his duties as a legislator. The act of acceptance of such a temporary office at such a time did not, in its nature, indicate any election or purpose to abandon or resign the membership in Congress. "The object of the constitutional prohibition upon an officer becoming a member of Congress is attained, so far as it can be by this provision, if the inhibition attaches the moment the member enters upon the discharge of his duties as such, and nothing is gained by an earlier application of it." There was, therefore, no constitutional objection to * * * [the member] accepting this office of judge-advocate, if he did become such officer.

PROHIBITORY STATUTES.

The acts of Congress above referred to, of the dates, respectively, of March 3, 1839, and of the 23d and 26th of August, 1842, are, as is said by the Attorney-General of the United States (5 Opins., 768), "the same in their sense and meaning;" and as to all of these acts, including that of September 30, 1850, above cited, he says "they do not forbid a person from holding two compatible offices at the same time. They were intended to prevent arbitrary extra allowances in each particular case, but do not apply to distinct employments with salaries affixed to each by law or regulations." (See also 6 Opins., 80 and 325.)

If the committee were left to their own construction of these statutes of 1839, 1842, and 1850, we would have attained the same conclusion to which the Attorneys-General arrived in these opinions. But when there is added to the force of these and several other equivalent opinions by the Attorneys-General of this Government, the weight of the fact that all these statutes were in force when most of the very numerous decisions by this House were made, determining that there was nothing either *illegal* or unconstitutional in a member of Congress elect (but not qualified) holding an office under the United States Government, provided he did not hold it after the time came when the Constitution required him to assume his duties as a legislator, the committee could not hesitate in coming to the conclusion that neither the Constitution nor either of these statutes alluded to in the opinion of the Attorney General were violated when * * * [the member] became (if he did) special judge-advocate, and took compensation therefor. We say "took compensation therefor," because in all the cases we have cited the member-elect, as the committee understands the history of the cases, received his compensation for his first office during the time he held it, but not his compensation as a member for the same time.

THE STATUTE AGAINST JOBBING.

Although not quite in proper order, it may perhaps as well be said here as anywhere else that the committee do not see what the statute of April 24, 1808, has to do with this inquiry. That act renders it a crime for any member of Congress to "undertake, execute, hold, or enjoy, in whole or in part, any contract or agreement, hereafter to be made or entered into, with any officer of the United States, in their behalf, or with any person authorized to make contracts on the part of the United States." No "contract" or "agreement" has been proved in this case between * * * [the member] and any other person, coming within

what is the obvious meaning of these words in the act of 1808. The design of that statute is what is expressed by the Attorney-General of the United States (4 Opins., 48) when he says, "The object of the statute is only to prevent jobbing between members of the legislature and the Executive for the primary advantage of the former." Surely the practice, which has been general and uninterrupted, as must be within the personal knowledge of every intelligent citizen, of members of Congress acting as the attorneys of their Government, has not subjected all such attorneys to indictment and fine of three thousand dollars. No one has suggested that such is the law, and the committee would have made no allusion to it but for the fact that it is presented to our consideration in the brief of * * * [the member].

THE ACT PROHIBITING MEMBERS BECOMING CLAIM AGENTS, ETC.

The act of June 11, 1864, cited above, renders it a high crime for any member of Congress, at any time after his election, "to receive or agree to receive any compensation for any services rendered to any person in relation to any proceeding, contract, claim, controversy, charge, accusation, arrest, or other matter or thing in which the United States is a party, or interested directly or indirectly, before any department, court-martial, bureau, officer, or any civil, military, or naval commissioner whatever."

This statute would have been directly in point had * * * [the member] received compensation for being the counsel for Haddock in this court-martial. The fact that this recent statute, passed in full and thoroughly intelligent view of all the important questions of law, which your committee is required to consider, carefully confines its prohibitions to preventing members-elect from taking compensation for services rendered before courts-martial, &c., "to any person" and against the Government, and does not prohibit such compensation being paid by the Government, nor prohibit such service being rendered in its favor; and this, too, in the identical case before the committee, is one of the strongest possible legislative determinations of the very question we consider. Here is a law which comes up squarely, face to face, in front of that exact question we consider, to wit, whether a member-elect to Congress ought to be permitted to receive compensation for services rendered to either of the parties to a trial before a court-martial. And the Congress said it should not be lawful for him to take compensation for services rendered to one side—"any person"—and now shall we be told that Congress meant to declare that it was equally illegal to take compensation for services rendered to the other side, to wit, for services in favor of the United States? On the other hand, is this not a conclusive legislative determination that a member-elect might be compensated for services rendered to that other non-prohibited side of the case? It so seems to the committee.

[Senators and Representatives in Congress have been employed by private parties in causes in court in which the United States had an interest either directly or indirectly, sometimes for and sometimes against such interest, yet it has never been supposed any law prohibited such employment. (Leavenworth, &c., *R. R. Co. v. United States*, 92 U. S., 739.)]

ACT OF 1852.

This disposes of all the alleged legal prohibitions upon * * * [the member's] entering upon the service, unless it be (and we think includ-

ing) that supposed to be contained in the eighteenth section of the act of 31st August, 1852, already cited (1 Brightly, 821), and which is as follows: "No person hereafter who holds or shall hold any office under the Government of the United States, whose salary or annual compensation shall amount to the sum of two thousand five hundred dollars, shall receive compensation for discharging the duties of any other office." (10 Stat., 100; Rev. Stat., 1763.)

It was suggested in the debates in the House, and earnestly urged elsewhere, that this section, even if it did not render * * * [the member's] services upon the Haddock trial illegal, does render it illegal for him to receive compensation for his services upon that trial. The committee is not quite certain that the order of the House directing it to inquire into the charges against * * * [the member] contained in the letter of General Fry to Mr. Blaine admits of the committee's examining the question whether * * * [the member] was entitled to take that compensation of \$3,000. That letter does not charge that the taking of *any* fee was illegal, but only insinuates that it was excessive. Still, after what occurred touching this double compensation in the debates of the House, the committee deem it proper to examine this question also. If it be outside of the duties of the committee, an easy way of preventing mischief from this part of the report will be to disregard it.

The determination of the question whether this act of 1852 renders it illegal for * * * [the member] to receive, in addition to his salary as a member of Congress, this \$3,000, requires the committee to determine one or more of the following questions:

1. Is one who has been elected to Congress, but who has not yet taken the oath of office, nor in any way entered upon the discharge of the duties of his office, and prior to the time when, by law, he is required to enter upon these duties, "a person who holds any office?"

2. Granting that he is, in the case stated in the preceding question, a person holding an office, then does he hold an office "under the Government of the United States" within the just sense of this section?

3. If he, as a member-elect, is an officer "under the Government of the United States," then did * * * [the member], in what he did in the Haddock service, become an officer of the United States?

4. If he did not become an officer of the United States, did he, in that Haddock trial, discharge "the duties of any other office" and receive compensation therefor?

IS A MEMBER-ELECT ONE HOLDING OFFICE?

The first of these inquiries is, in the judgment of the committee, answered so far as is necessary in deciding upon the effect of the act of 1852, by the cases of Hammond, of Earl, of Mumford, of Schenck, and others, which we have already cited. These cases, as we have seen, all determine that, prior to the time when the Constitution requires the member elect to commence the duties of his legislative office, and before he has assumed these duties and taken the oath of office, he may receive compensation for discharging the duties of another office. As we have already said, these cases do not determine that he may also be compensated as a member of Congress for the same time for which he was compensated in the other office. But they do determine that being a member-elect of Congress does not make him an "officer" in such sense as to bring him within the prohibition of the act of 1852. This question, in substance, received the careful attention of the House in the thirty-

eight Congress, upon an able report of one of its committees. The committee and House came to what your committee deem a just conclusion, when it determined that one merely elected to Congress, but who had not entered upon his duties nor been qualified, was not a member of this House—that is, did not hold an office so as to prevent him from continuing to hold another office and receive compensation therefor. The committee, in concluding their argument showing that one merely elected to Congress was not a member of the House, and not, as such, amenable to its jurisdiction, says: “The committee are not aware of any attempt to punish a representative elect, and of but one instance of an attempt to expel one. A resolution was adopted by the last House, under the previous question, to expel a person who was a representative elect, but had never signified his acceptance of the office, nor qualified, nor even appeared in Washington for the purpose of taking his seat.”

In that case the House determined, in effect, that the act of 1852 did not prohibit General Schenck, while a member-elect of Congress, from receiving the pay of another office, to wit, that of major-general of volunteers.

This is the last case in which this question came before the House. But the same question received in the Fifteenth Congress, in the case of *Hammond v. Herrick* (Clark and Hall, *Contested Elections*, 293, 294), a still more elaborate and exhaustive consideration. In the report in that case (which also received the sanction of the House) this doctrine was explicitly stated, and was affirmed after a thorough review of the English and American cases touching it. The case held the rule which was stated by the committee in these words: “Neither do *election and return* constitute *membership*.” * * * “Our rule in this particular is different from that of the House of Commons. It is also better, for it makes our theory conform to what is fact in both countries—that the act of becoming in reality a *member of* the House depends wholly upon the person elected and returned. *Election* does not of itself constitute membership, although the period may have arrived at which the Congressional term commences.”

This House has again and again determined that men elected to it who do not appear in the body and assume the constitutional oath of office are not to be reckoned as members of the House in determining the number required to make a majority or quorum of the body.

FRANKING PRIVILEGE, ETC.

The committee, in coming to this conclusion, have not overlooked the fact that members-elect, but not qualified, are by the laws accorded certain privileges and salary. The effect of this right to enjoy these privileges before becoming qualified as a member of the legislative body has received the fullest attention both in this House and in the English Parliament. The result attained is that these special privileges are not necessarily indicia of actual official authority or station, and may by law as well be attached to one's person before and after he is an officer as during his official tenure. The Representatives after the expiration of their terms, the Presidents of the United States after such expiration, and the widows of certain ex-Presidents, all have the franking privilege, and these are not then officers of the Government in any sense. The assumption of office in this country, as well as its relinquishment, is voluntary, and one elected to Congress is at perfect liberty to refuse to assume the office. His exercise of the franking privi-

lege with the knowledge that he never would enter upon the duties of the office would be an act of bad faith toward his Government; but that would not render him a member of Congress, nor would the exercise prevent him, should failure of health or other cause render it improper to enter upon his office, from rightly refusing ever to take the office.

Other and perhaps more conclusive considerations bearing upon this important inquiry might be given; but it is not deemed best to pursue it further. The committee are entirely satisfied that the law of this House is fully and rightly settled as to this point, and that he is not a *member* of Congress, nor one who "holds any office under the Government of the United States," who has only been elected to this House, but who has never taken any oath of office nor entered upon the duties of that position.

* * * [the member] was not prohibited by the act of 1852 from receiving compensation as he did for his services in the Haddock trial, even if his duties on that trial were official. We have not yet reached the question of his right to be also paid his salary as a member of this House for the same time covered by the Haddock service.

IS AN ACTING MEMBER OF CONGRESS AN OFFICER OF OR UNDER THE GOVERNMENT?

The next proposition the committee were called to consider and decide is thus stated by * * * [the member]:

"A representative in Congress is not at all within the words '*person who holds an office under the Government of the United States.*' Senators and Representatives do not hold offices *under the Government of the United States.* They are part of the Government, and therefore not affected one way or the other by these provisions."

If the committee were sustained in the views they have taken of other propositions in this inquiry, then the consideration of this one would not be necessary to the determination of what is before the committee. But as the committee may not be sustained in the other propositions which dispose of the case, they have felt impelled carefully to consider this one.

The proposition that a member of Congress who has been sworn into office is not an officer under the Government of the United States, within the sense of the act of 1852 is supported by an appeal to authorities expounding the sense of these words as used in the Constitution.

These or similar words are found in the Constitution in the following clauses:

1. That prohibiting Senators and Representatives during the term for which they are elected from being appointed to "any civil office *under the authority of the United States*" which was created or its emoluments increased during such time.

2. That prohibiting a person "holding *any office under the United States* from being a member of either House of Congress."

3. That giving Congress the power to make all laws necessary to carry into effect the powers vested by the Constitution in "*any officer of the Government of the United States.*"

4. That prohibiting every "*person holding any office of profit or trust under the United States* from accepting any present, office, &c., from any king, prince, or foreign state without the consent of Congress."

5. That prohibiting every Senator, Representative, and person "*hold-*

ing an office of trust or profit under the United States” from being appointed an elector for President, &c.

6. That providing that the President shall commission “*all officers of the United States.*”

7. That providing that “*all civil officers of the United States* shall be removed from office on impeachment.”

8. That prohibiting any one who has suffered a judgment of impeachment from holding or enjoying “*any office of honor, trust, or profit under the United States.*”

The proposition stated, and which the committee are asked to affirm, is, that a member of Congress and his office are not included in the scope or meaning of the words of the Constitution “*officer under the United States,*” or “*civil office under the authority of the United States.*” It is said that he is part of the Government, and is not under it. It seems to be indicated that he may, in the sense of the Constitution, be an officer *of* the Government, but not *under* the Government. In the impeachment of Blount (Wharton's State Trials, 268, &c.) this argument is presented by Mr. Bayard, but he (p. 269) makes the very proper remark as to such an argument that he was “unwilling to place any confidence upon an argument derived from mere verbal criticism. In construing the charter of a government, our views should comprehend all its parts, and our aim should be to execute it according to its general and true design.” No method of attaining the sense of the Constitution is more unsafe than this one of “sticking” in sharp verbal criticism. But a little consideration of this matter will show that “*officers of*” and “*officers under*” the United States are (as said by Mr. Dallas, in this Blount case, p. 277) “indiscriminately used in the Constitution.” Take that clause as to who may be impeached. The Constitution says that “the President, Vice-President, and all civil officers *of* the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.” Now, then, if officers of the United States do not include officers *under* the United States (that is, officers appointed by the President, such as judges, &c.), then you cannot impeach anybody except the President, Vice-President, and, perhaps, the members of Congress, if the latter are to be deemed officers *of* the Government. Again: the judgment of impeachment disqualifies the convict from holding “*any office of trust or profit under the United States,*” and not from holding the offices *of* the United States. You can only impeach those who are officers *of* the United States, and then, when impeached, they are only prohibited from holding offices *under* the United States—that is, they can hold the same offices from which they were excluded by impeachment, but cannot hold the inferior executive offices under those from which the impeachment does not perpetually exclude them.

Again, the Constitution provides that “the President shall appoint all officers *of* the United States.” Are not the judges, ministers, heads of departments, postmasters, &c., officers *under* the United States? If so, they are also officers *of* the United States, because the Constitution only authorizes him to appoint officers *of* the United States.

It is irresistibly evident that no argument can be based on the different sense of the words “*of*” and “*under,*” as used in these clauses of the Constitution, and we must approach this question as to whether a member of Congress is an officer “*under*” the United States, with the knowledge that if we find him to be *either* an officer “*of*” the United States, or one “*under*” the Government of the United States, in either case he has been brought within the constitutional meaning of these words,

as used in the act of 1852, because they are made by the Constitution equivalent and interchangeable.

All we have to do, therefore, is to find out whether the Constitution *anywhere* (not *everywhere*) uses these expressions "officers of" or "officers under the United States" in such sense as must include members of Congress. If the Constitution *once* so uses either of these equivalent expressions, then all argument as to the sense of these words in the act of 1852, so far as that argument is derived from their meaning in the Constitution, is destroyed, because if the Constitution *once* uses these words in a sense which includes members of Congress, then so may the act of 1852 so use them.

Now, let us see whether there is any clause where one or other of these phrases "officers of" or "officers under the Government of the United States" must include members of Congress.

Take the clause above cited as to receiving presents, &c., from any king, &c. There the prohibition is that "no person holding any office of profit or trust *under* the United States shall," &c. Now, will it do to hold that a clerk in the post-office shall not be permitted to receive offices, &c., from a king, &c., without the assent of Congress, and yet every member of the Senate or of the House be permitted to be "plied," in the interests of a foreign Government, with bribes, in the shape of presents, offices, emoluments, and titles? May the King of England make the American Senate a British House of Lords? He may, unless the position of a Senator and Representative is an "officer *under* the United States," because there is no other clause prohibiting such bestowals. Again, take the clause containing the requirement that no religious test shall ever be required as a qualification to any office or public trust *under* the United States. Now, shall it be held that a member of Congress may be required to have some religion, or a particular religion, by the establishment of a religious test as to his office, and yet all the other offices of the Government be kept open to the infidels? And yet this is the law of the Government, unless a member of Congress be one holding an office or public trust under the United States; for there is no other prohibition than this one upon requiring such religious tests.

Or take the clause, already cited, as to the effect of judgments of impeachment. If a member of Congress does not hold any office of trust or profit under the United States, then his is an office into which one may immediately and freely enter who has, by impeachment, just been convicted of treason, bribery, or other high crime. This is because that the only places into which an impeached felon cannot enter are "offices of honor, trust, or profit *under* the United States." The convicted traitor may not enter the office of "deputy United States assessor of internal revenue," but he may become United States Senator!

We might increase these examples, but surely it is not necessary. Surely it cannot be that the Constitution contains elements so repugnant to all just or safe principles of government.

But we are referred to authorities to establish this proposition that a member of Congress is not an officer "of" or "under" the United States; and the leading case relied on is the impeachment of William Blount, a United States Senator from Tennessee. The case is found fully reported in Wharton's State Trials, 250. Justice Story (1 Const., sec. 793) says this case decides that a United States Senator is not a civil officer of the United States. This remark of the learned author is obviously an incautious one, and not fully authorized by what occurred in that case.

The same author in the same section expressly declares that the “reasoning by which the decision was sustained does not appear, the deliberations having been private.” He adds that “it was *probably* held that civil officers of the United States meant such as derived their appointment from and under the National Government,” &c. The defenses of Mr. Blount (see page 260) were various. His main ones were: First, that the offenses charged were cognizable in the civil courts and not on impeachment, they not relating to his official duties. Second, that he had been expelled from the Senate before the trial of the impeachment, and that he was *therefore* not an officer of the United States and not amenable to the Senate.

As to what this case does decide, Wharton (page 317) justly says: “In a legal point of view all that this case decides, is that a Senator of the United States *who has been expelled* from his seat is not, *after such expulsion*, subject to impeachment; and *perhaps* from this the broader proposition may be drawn that none are liable to impeachment except officers of the Government in the technical sense, excluding thereby members of the national legislature.”

Judge Story further says of the decision that it was one on “which the Senate was greatly divided,” (14 to 11,) and which “seems not to have been quite satisfactory to the minds of some learned commentators.” (4 Tuck. Black. Com. App., 57, 58; Rawle on Const., ch. 22, pp. 213, 214, 218, 219.)

Without, therefore, designing to determine that the case of Blount did not decide that a member of Congress was not a civil officer of the United States “in some technical sense,” the committee are wholly unable to come to the conclusion that the members of the national Congress are not, in the enlarged and general sense of the Constitution, officers of their Government. The committee do not believe that any authority is to be found holding that they are not. It by no means follows, because a member of Congress may not be tried by impeachment, that he is not a “civil officer of the United States” in the sense we now consider. There are other clauses and principles of the Constitution which affect the question of the right to impeach a Senator, besides that single one as to who are included in the just sense of the words “civil officers of the United States.” Such is that one providing a method for the expulsion of members; also, those as to the separate and independent action of the two Houses touching their own members, &c. These and like considerations may well be held to control and qualify the words of the clause of the Constitution as to who may be impeached. No one can read the singularly able and exhaustive argument in the case of Blount and not realize that the other principles and terms of the Constitution ought to and did control the sense of the words “all civil officers of the United States” as used in this clause. The committee decline to find that an acting member of Congress is not an officer of this Government within the sense of at least *some* of the clauses of the Constitution. The committee here leave this important question made in this case. The effort of the committee, so far as this single point is concerned, has been to bring to the attention of the House the leading considerations which must form the basis of its determination by the House, should its determination be found necessary. In the opinion of the committee the determination of this point is not necessary to the right determination of all that is before the committee, and this is not, perhaps, a proper case in which to make a precedent upon so vital a constitutional question.

ACT OF 1852 INCLUDES ACTING MEMBERS IN THE WORD "OFFICE."

But suppose it be granted that the *constitutional* sense of the words "officer of the United States," or "office under the United States," be what is insisted by * * * [the member], does it follow that they are used in so limited a sense in the act of 1852? Having regard to the mischief meant to be prevented by it, the committee have been wholly unable to find adequate reasons why a member of Congress who has taken his seat should not be deemed an officer "of" or "under" the Government in such sense as that he should not be permitted to draw the salaries of two offices at the same time, though holding but one. To hold that a member of Congress is as free as other men from human infirmities, and as little liable to fall into temptation, is, probably, according to him as high a grade of virtue as would be accorded to him either by the truth or by the judgment of his fellow-men. But if you look to the nature and powers of his office, and the absolutely vital importance of having him removed as far as possible from the bad influences of corruption and avarice, such as he would be liable to encounter, could he become entitled to the pay of many offices at the same time, the propriety of holding that this act of 1852 meant to preclude members of Congress from receiving double salaries becomes quite irresistible. We therefore conclude that whatever may be the meaning of the words "office under the United States," as used in the Constitution, they, in the act of 1852, ought to be held to, and do, preclude an *acting* member of Congress from receiving compensation for the duties of any other office.

WAS * * * [THE MEMBER] AS ACTING JUDGE-ADVOCATE AN OFFICER?

We are now brought to the question whether * * * [the member] in what occurred in this prosecution of Haddock, became an officer of the United States. That he did not we think is most readily ascertained. An office is a particular duty, charge, or trust *conferred by public authority*, and for a public purpose, with a right usually attached to receive a fixed compensation for such service. Nothing can be plainer than that no office of this Government can be created or conferred except by some public authority authorized by law to confer it. Upon this very question Chief-Justice Marshall, in the case of Maurice (2 Brock., 101), says: "It is too clear, I think, for controversy that appointments to office can be made by heads of departments in those cases only which Congress has authorized by law, and I know of no law which authorizes the Secretary of War to make this appointment." And in that case it was decided that Maurice did not become an officer, and that his contract with the Government, on which the suit was brought, was good only by reason of the fact that the United States is a government, and as such can, at common law, make a valid contract with its agents as to matters of government.

The Constitution, article 2, section 2, clause 2, provides that "the President shall nominate, and, by and with the advice of the Senate, shall appoint" * * * "all officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of Departments." This clause covers every possible office under or in the Government. Aside from the President, Vice-President, and members of Congress (these

being the offices included under the above words, “appointment herein provided for”) there are but three repositories in which *can* be placed the power to bestow any office, to wit, the President (the Senate assenting), the courts of law, and the heads of Departments. There was in April, 1865, no law giving to any court or any head of any Department any power whatever to confer upon any person any office of general or special judge advocate as *an officer* of the Government.

The sixth section of the act of July 17, 1862 (2 Brightly, 25), authorizing the President, with the assent of the Senate, to appoint a judge-advocate with rank and pay of a major of cavalry for each army; and the sixth section of the act of June 20, 1864 (2 Brightly, 26), authorizing the President, with assent of Senate, to appoint a judge-advocate general, with rank of brigadier-general, and an assistant, with rank of colonel of cavalry, are the only laws then in force, so far as the committee find, permitting the appointment of any judge-advocate as such. Counsel in their briefs have treated the forty-ninth section of the articles of war of April 10, 1806 (1 Brightly, 79), as being also in force, which the committee assume on their authority it was. This last permitted the *judge-advocate* or the *general or officer commanding the army, detachment, or garrison* to “*depute some person to prosecute in the name of the United States*” military offenses. If there are any other laws bearing upon these appointments they have escaped the attention of the committee. The same section last named provides that “the judge-advocate, *or person officiating as such,*” shall take a certain oath to keep secret the doings of the court. (1 Brightly, 86.) The twenty-fifth section of the act of 3d March, 1863 (2 Brightly, 26), authorizes the judge-advocate to issue process for witnesses. This oath and these duties * * * [the member] took and performed in the Haddock trial. He had no other appointment or commission than that shown by the letters of April 3 by Mr. Dana, set forth in the letter of General Fry to Mr. Blaine. He was not required to, nor did he take the usual oath of all officers of the United States, nor did he take the oath required by the act of July 2, 1862. (2 Brightly, 348.) Without taking that oath he could not enter upon or take compensation for the duties of any office whatever, except the office of President. There is no law anywhere authorizing Mr. Stanton to appoint any one to the office of judge-advocate. In the letter of Mr. Dana above quoted it was said that “the Judge-Advocate General will be instructed to issue to you an appointment as special judge-advocate for the prosecution of any cases that may be brought to trial before a military tribunal.” But even this was not done. Under this state of law and fact the committee do not think that * * * [the member] either did or could become an “officer” of the United States. Under these laws a judge-advocate or a general or officer might under the Constitution “depute” * * * [the member] as *agent*, but could not give him an *office*, because the Constitution does not permit these men to be authorized to appoint to *office*.

“DUTIES OF ANY OTHER OFFICE.”

The only remaining question is whether his being paid \$3,000 for five months' service, from April 3, 1865, was such a compensation for “discharging the duties of any other office” as to require * * * [the member] in justice or legal propriety to either pay back what he has received for those services or else not to draw his salary as a member of Congress for that time.

The committee submit to the House the following propositions as conclusions at which they have arrived as to this point:

1. When a member-elect of Congress has drawn the salary or pay for any other office, for any time after the 4th of March preceding his entering upon his duties as a member of Congress, he should not receive any compensation as a member of Congress for that same time.

2. The act of 31st August, 1852 (1 Brightly, 821), which is relied on as prohibiting * * * [the member] from receiving the \$3,000, does not apply to "duties" or services for which there was no officer provided by law whose duty it was to discharge them, and which duties were, in their nature and in law, such that "some other person" than an officer might legally discharge them.

3. The duties discharged by * * * [the member] were duties for the doing of which the law had not provided nor paid any other officer, and charged such officer, as part of *his* official duty at that time and place, to enter upon and do. But, on the other hand, they are services which in their nature and under existing law (1 Brightly, 79 and 80) some other person than a judge-advocate could do. The law expressly permitted some person not a judge-advocate, and "detailed by him," and "officiating as such," to discharge them.

4. The law, or military regulations in pursuance of law, may confer upon private individuals not officers powers similar to those usually exercised by officers, such as that of issuing subpoenas, swearing witnesses, &c. Such is common in regulations touching elections, special commissions, the duties in some of the States of attorneys, of grand jurors, and the like. These conferments of such temporary or limited powers do not, in the sense of the Constitution and laws of the United States, *necessarily* constitute the recipient of them "officers" nor make their duties those of "any office."

* * * [The member's] services in the Haddock trial were not "the duties of any other office" within the meaning of the act of 1852, and he was entitled to compensation therefor the same as for any private service rendered by him in his profession. His having, therefore, received this money as the ordinary earnings of his profession, its receipt no more requires him to decline to draw his salary for that time than the collection of any of his other earnings during that time requires it

In view of all the considerations thus presented it is clear that the claimant, Mr. Crowley, is entitled to payment.

TREASURY DEPARTMENT,

First Comptroller's Office, December 31, 1882.

INDEX TO DECISIONS.



A.

	Page
<i>Abandoned Property—</i>	
1. As to provisions for collection of.....	XXXVIII
<i>Abandoned Rights—</i>	
1. Who is invested with.....	168
<i>Abandonment—</i>	
1. As to vacations.....	346
<i>Abatement—</i>	
1. Moneys recovered on information paid into Treasury without.....	212
<i>Abbreviation—</i>	
1. Effect of "do." in schedule in appropriation act.....	266
<i>Absence—</i>	
1. Leave of.....	345
<i>Absenteeism—</i>	
1. As to substitutes.....	347
<i>Absurd Consequences—</i>	
1. As to construction of statute.....	324
<i>Abuse—</i>	
1. Of discretion, example of.....	147
<i>Academy of Science—</i>	
1. As to public health.....	226
<i>Acceptances—</i>	
1. Of drafts by officers or agents cannot bind Government.....	18
<i>Acceptor—</i>	
1. Signature of, as to indorsement.....	189
<i>Accidental Omissions—</i>	
1. How supplied.....	282
2. May be supplied.....	315
<i>Accord and Satisfaction—</i> (See <i>Balance</i> ; <i>Payment</i> ; <i>Salary</i> ; <i>Set-off</i> .)	
1. Amounts awarded and certified to be paid on account of the illness and burial of late President Garfield.....	387
2. As to payment of salary.....	297
3. As to satisfying balance by set-off.....	XXXIII
4. Draft or check as.....	233
5. On the part of the Government.....	XXXVII
6. Proceedings to settle controversy as to set-off.....	XXIX
7. Treasury practice as to set-offs.....	206
<i>Account—</i>	
1. Copy of form for miscellaneous expense.....	259
2. Form for internal revenue agents, monthly expense.....	256
3. Of H. S. Huidekoper, questions arising in.....	156
4. Of lost and destroyed greenbacks.....	169
5. Of Richard Crowley as attorney at law, as to.....	355
6. Restatement of.....	XXXI
7. Settlement of mail contractors.....	1
H. Mis. 37—	29

	Page
Accounting Officer—	
1. As to power of, over settlement of contracts for carrying mails.....	9
2. As to refusal of, to exercise judgment on an account.....	XXXVI
3. Extent of jurisdiction of.....	XVII
4. Must act on his own judgment.....	XVI
5. Relation of, to judicial authority.....	XXI
6. Right of any, to perform any official duty by deputy.....	81
Accounting Officers—	
1. Action of, as to claims.....	XXXV
2. Action of, as to refunding tax.....	129
3. Action of, in some cases conclusive on courts.....	XLII
4. Action of, limited as to remedies.....	200
5. Action of, not concluded by certificate of judge.....	155
6. Allowance of credit by, as to Government bonds.....	205
7. Appeal from decision of.....	269
8. As to accounts of consular officers.....	349
9. As to claims pending for consideration of.....	XXXVII
10. As to conclusiveness of judgment in United States courts.....	XXIX
11. As to control of, by writ of injunction.....	XXXVI
12. As to effect of judicial interference with action of, on claims.....	XXXIV
13. As to exercise of judicial authority against.....	XXXIV
14. As to judgment and determination of.....	XXI
15. As to jurisdiction of.....	XLII
16. As to vouchers and substitutes.....	346
17. Authority of.....	135
18. Cannot declare forfeitures of rights in which the Government has no interest.....	1
19. Conclusive effect of action of.....	XXXI
20. Decisions of, as to negotiable securities.....	171
21. Disallowance by, of claims.....	156
22. Duties of, as to consideration of claims.....	137
23. Duties of, cannot be delegated to deputy.....	76
24. Duty of.....	146
25. Duty of, regarding claims.....	22
26. Duty of Secretary as to.....	XXXV
27. Judicial authority exercised in aid of.....	XXXIV
28. Judicial proceedings as to transfers or payments of bonds.....	XXXIV
29. Jurisdiction of.....	XVI
30. Jurisdiction of Court of Claims as to action by.....	78
31. Liability of.....	XXXVII
32. May make set-offs.....	XXIX
33. Of Treasury, judges of law and fact on claims and accounts.....	62
34. Only in Treasury Department.....	XXXV
35. Power of, over claims for unliquidated damages.....	1
36. Relation of, to judicial authority.....	XXXIV
37. Settle principles of law which are recognized by courts.....	XLII
38. Statement of, against depositary.....	167
39. When required to accept as valid claims allowed by other officers.....	135
Accounts—(See List; Miscellaneous; Public.)	
1. Adjustment and settlement of.....	274
2. Allowance of.....	148
3. As to auditing and settling.....	XXVI
4. As to balances certified against executive officers.....	XXXIX
5. As to illness and burial of late President Garfield.....	374
6. Certification of balances arising on.....	77

	Page.
<i>Accounts—(See List ; Miscellaneous ; Public)—Continued.</i>	
7. Control of Secretary of the Treasury over.....	XXXVIII
8. Corrections in, before final settlement.....	XXXII
9. For advertising, adjustment of.....	311
10. For diplomatic and consular service.....	26
11. Mode of certifying.....	153
12. Of board of health.....	221
13. Of chief supervisors of elections.....	154, 155
14. Of collectors of internal revenue.....	243
15. Of commissioners of circuit courts.....	154
16. Of diplomatic and consular officers.....	349
17. Of disbursing officers, as to.....	XXVII
18. Of disbursing officers, how settled.....	28
19. Of expenses of sale, how audited.....	56
20. Of expenses of sale of old material.....	37
21. Of money deposits as to pension agents.....	187
22. Of officers invested with discretionary authority.....	147
23. Of pension agents.....	185
24. Of special agents, settlement of.....	303
25. Of supervisors of elections.....	153
26. Of Treasurer of the United States, stated by First Auditor.....	200
27. Opening and re-examining.....	316
28. Relating to sales of land.....	369
29. Settled by First Comptroller.....	192
30. Settlement of, by Sixth Auditor.....	4
<i>Accounts Settled—</i>	
1. As to tribunals, required to examine.....	XXVI
<i>Accusation—</i>	
1. As to per diem fees.....	269
<i>Acknowledgment—</i>	
1. As to negotiable instruments.....	292
2. As to power of attorney on draft.....	190
<i>Acknowledgments—(See Revised Statutes.)</i>	
<i>Acknowledgments—</i>	
1. Of assignments.....	286
<i>Acquittance—</i>	
1. As to payment on forged indorsement.....	187
<i>Act—</i>	
1. Creating Deputy Comptroller, quoted.....	70
2. Creating office chief supervisor of elections.....	154
3. Providing for publication of laws of the United States.....	v
4. Relating to courts and judicial officers in Utah Territory, when approved.....	120
5. August 7, 1878, principal and agents.....	72
6. September 2, 1789, Treasury Department.....	72
7. September 2, 1789, warrants Treasury Department.....	68
8. September 24, 1789, as to trials at common law.....	XXII
9. September 24, 1789, civil jurisdiction of commissioners.....	89
10. September 24, 1789, duty of marshal.....	89
11. September 24, 1789, marshal, sheriff.....	75
12. September 24, 1789, Supreme Court.....	299
13. April 30, 1790, definition of crime of rebellion.....	52
14. May 8, 1792, assignment of pay.....	13, 27
15. May 8, 1792, authorizing persons to perform duties of heads of Departments.....	69

<i>Act—Continued.</i>	<i>Page.</i>
16. May 8, 1792, fees of marshals.....	90
17. May 8, 1792, mileage for marshals.....	99
18. March 2, 1793, jurisdiction of commissioners.....	89
19. March 2, 1793, return of process.....	89
20. February 28, 1795, marshal, sheriff.....	75
21. July 16, 1798, American seaman's fund.....	40
22. July 16, 1798, contracts.....	104
23. July 16, 1798, donations, hospitals.....	39
24. February 28, 1799, marshals' fees.....	166
25. February 28, 1799, marshals' fees, limitation.....	165
26. February 28, 1799, quoted from.....	166
27. February 27, 1801, District of Columbia.....	195
28. February 28, 1803, destitute American seamen.....	26
29. February 28, 1803, Marine Hospital fund.....	40
30. February 28, 1803, return of seamen.....	26
31. February 20, 1812, District Commissioners.....	92
32. February 20, 1812, jurisdiction of commissioners.....	89
33. June 24, 1812, administration.....	231, 238
34. June 24, 1812, claims, suits.....	181, 236
35. February 27, 1813, salary of attorney.....	119
36. March 1, 1817, jurisdiction of commissioners.....	89
37. March 3, 1819, civilization fund.....	371
38. May 15, 1820, adjustment of claims.....	XXXIX
39. May 15, 1820, collectors of customs.....	115
40. January 31, 1823, advances of public moneys.....	128
41. March 3, 1825, power to sell old material.....	46
42. January 25, 1828, salary, set-off, claim.....	22
43. March 3, 1835, Delaware Breakwater.....	298, 299
44. May 20, 1836, claim, salary, set-off.....	22
45. March 3, 1839, Army.....	356
46. March 3, 1839, branches of the public service.....	361
47. March 3, 1839, extra allowances.....	305
48. March 3, 1839, referred to, and quoted from.....	355
49. March 3, 1841, fees.....	304
50. March 3, 1841, salaries district attorneys.....	119
51. September 4, 1841, land grants.....	370
52. August 22, 1842, criminal process.....	90
53. August 22, 1842, issue of process.....	89
54. August 23, 1842, Army.....	356
55. August 23, 1842, branches of the public service.....	361
56. August 23, 1842, extra allowances.....	305
57. August 23, 1842, quoted.....	356
58. August 26, 1842, extra services.....	305
59. August 26, 1842, officers, clerks.....	361
60. August 26, 1842, quoted from.....	335
61. August 26, 1842, style and title of acts.....	335
62. August 26, 1842, Supreme Court.....	299
63. August 29, 1842, reporter of Supreme Court.....	300
64. August 29, 1842, Supreme Court.....	299, 300
65. March 3, 1845, appropriation act.....	303, 304, 305
66. March 3, 1845, quoted from.....	303
67. February 20, 1846, orphans' courts, District of Columbia.....	195
68. July 29, 1846, assignment of claims.....	XLI
69. July 29, 1846, assignments void.....	23

	Page.
<i>Act—Continued.</i>	
70. July 29, 1846, officer, claim	19
71. July 29, 1846, prohibiting assignments.....	128
72. July 29, 1846, transfers and assignments.....	19
73. August 6, 1846, disbursements	65
74. March 3, 1847, disposition of, proceeds of sale.....	44, 48
75. March, 3, 1847, proceeds of sales.....	45
76. March 3, 1847, sale of condemned clothing.....	38
77. March 3, 1849, depositing money.....	44
78. March 3, 1849, gross amount of proceeds for sale of public property.....	38
79. March 3, 1849, moneys recovered on information.....	212
80. March 3, 1849, receipts.....	43
81. March 3, 1849, salaries.....	305
82. March 3, 1849, section 13, Assistant Secretary.....	67
83. September 9, 1850, courts, legislature.....	152
84. September 9, 1850, sections 7 and 10, referred to.....	152
85. September 20, 1850, railroad grants.....	370
86. September 26, 1850, proceeds of sales.....	38, 45
87. September 28, 1850, sales of Government property.....	44
88. September 30, 1850, two salaries.....	305
89. August 31, 1852, two offices.....	357
90. February 26, 1853, claims.....	19
91. February 26, 1853, claims, assignment of.....	XLII
92. February 26, 1853, compensation of marshals.....	90
93. February 26, 1853, computation of mileage.....	91
94. February 26, 1853, fees.....	119
95. February 26, 1853, fees and costs.....	120
96. February 26, 1853, marshal's fees, limitation.....	165, 166
97. February 26, 1853, marshal's returns.....	88
98. February 26, 1853, misconduct in office.....	359
99. February 26, 1853, officer prosecuting claim.....	19
100. February 26, 1853, preventing frauds.....	23
101. February 26, 1853, prohibiting assignments.....	128
102. February 26, 1853, quoted from.....	19
103. February 26, 1853, transfers and assignments.....	19
104. March 3, 1853, chief clerks, duties	249
105. March 3, 1853, land grants.....	370
106. May 31, 1854, claim, appropriation.....	240
107. August 16, 1856, accounts, compensation.....	154
108. August 16, 1856, commissioners.....	269
109. August 16, 1856, pay of district attorneys and supervisors.....	153
110. August 18, 1856, quoted from.....	25
111. August 18, 1856, section 14, diplomatic service.....	25
112. March 3, 1857, disbursements.....	63
113. March 3, 1857, drawing check to claimant.....	33
114. March 3, 1857, public revenue disbursements.....	63
115. June 12, 1858, collectors, disbursing agents.....	157
116. March 30, 1860, commissioners and compensation.....	269
117. June 22, 1860, bonds, securities.....	202
118. June 22, 1860, loans.....	203
119. June 22, 1860, registered bonds.....	287
120. December 17, 1860, Treasury notes.....	287
121. February 8, 1861, bonds, securities.....	201
122. February 8, 1861, loans.....	203
123. February 8, 1861, registered bonds.....	287

	Page
<i>Act—Continued.</i>	
124. March 2, 1861, bonds, securities.....	201
125. March 2, 1861, contracts, advertising.....	105
126. March 2, 1861, loans.....	203
127. March 2, 1861, quoted from.....	293
128. March 2, 1861, registered bonds.....	287, 293
129. July 17, 1861, bonds.....	286, 287
130. July 17, 1861, bonds, securities.....	201
131. July 17, 1861, loans.....	203
132. July 17, 1861, registered bonds.....	290
133. August 5, 1861, bonds.....	286
134. August 5, 1861, direct tax act, twelfth section.....	331
135. August 5, 1861, direct tax acts compared.....	339
136. August 5, 1861, payment by warrant.....	340
137. August 5, 1861, proceeds of sales.....	340
138. August 5, 1861, section 36 quoted.....	339
139. February 25, 1862, United States notes.....	167
140. May 20, 1862, homesteads.....	370
141. June 2, 1862, contracts.....	104
142. June 7, 1862, colonization.....	332
143. June 7, 1862, direct tax..... 331, 334, 335, 336, 337, 338, 339, 342, 343, 344, 345	340
144. June 7, 1862, general legislation.....	341
145. June 7, 1862, payment to States.....	334
146. June 7, 1862, quoted from.....	274
147. July 1, 1862, income tax.....	104
148. July 17, 1862, assignment of contracts.....	22
149. July 17, 1862, attorney, oath.....	15
150. July 17, 1862, section 14, rights as to contracts.....	52
151. July 17, 1862, treason, rebellion.....	XIII
152. August 5, 1862, as to mode of disbursement of appropriation.....	371
153. March 3, 1863, land grants.....	67
154. March 14, 1864, additional Assistant Secretary.....	401
155. June 3, 1864, custodian of bonds.....	407
156. June 3, 1864, security for circulating notes.....	120
157. June 27, 1864, compensation of attorney.....	252
158. June 30, 1864, agents, inspectors.....	339
159. June 30, 1864, appropriations.....	275
160. June 30, 1864, assessment of taxes in insurrectionary States.....	13
161. June 30, 1864, assignments.....	26
162. June 30, 1864, assignments of wages.....	27
163. June 30, 1864, assignments on conditions.....	207
164. June 30, 1864, authority of Secretary, moieties.....	253
165. June 30, 1864, internal revenue.....	251
166. June 30, 1864, internal-revenue agents.....	206
167. June 30, 1864, legacies.....	207
168. June 30, 1864, referred to.....	179
169. March 3, 1865, bonds, loans.....	339
170. March 3, 1865, direct tax.....	335
171. March 3, 1865, payment of expenses.....	39
172. April 20, 1866, marine hospitals.....	44
173. April 20, 1866, proceeds of sales.....	339
174. April 20, 1866, unexpended balances.....	22
175. May 9, 1866, jurisdiction Court of Claims.....	300
176. May 21, 1866, publishing report of Supreme Court.....	300
177. May 21, 1866, reporter of Supreme Court.....	

	Page.
Act—Continued.	
178. June 14, 1866, deposits, disbursements.....	65
179. June 14, 1866, disbursing officers.....	65
180. June 14, 1866, disbursing officers, checks drawn by.....	33
181. July 13, 1866, agents, inspectors.....	252
182. July 13, 1866, executors, claims.....	211
183. July 13, 1866, internal revenue.....	253
184. July 13, 1866, moieties.....	212
185. July 13, 1866, taxes, legacies.....	206
186. July 16, 1866, school farms.....	339, 340
187. July 18, 1866, penalty for not depositing money.....	44
188. July 20, 1866, special disbursing agents.....	157
189. July 23, 1866, publishing report of Supreme Court.....	300
190. July 26, 1866, land grants.....	371
191. July 28, 1866, proceeds of sales.....	45
192. July 28, 1866, section 25, proceeds of sales.....	38
193. August 11, 1866, Indians, lands.....	366, 371
194. March 2, 1867, advertising.....	310
195. March 2, 1867, appropriations.....	302
196. March 2, 1867, frauds.....	244
197. March 2, 1867, general inspectors.....	252
198. March 2, 1867, publishing report of Supreme Court.....	300
199. March 2, 1867, quoted from.....	301, 310
200. March 2, 1867, reconstruction.....	344
201. March 2, 1867, section 10, referred to.....	300
202. March 2, 1867, reporter of Supreme Court.....	300
203. March 2, 1867, signing Treasury warrants.....	67
204. March 2, 1867, Supreme Court.....	299, 301
205. March 23, 1867, reconstruction.....	344
206. March 29, 1867, advertising.....	310
207. March 29, 1867, quoted from.....	310
208. July 19, 1867, reconstruction.....	344
209. April 20, 1868, marine hospitals.....	49
210. June 11, 1868, District sinking fund.....	402
211. June 22, 1868, Arkansas.....	345
212. June 25, 1868, admission of Southern States.....	345
213. July 20, 1868, internal revenue.....	253
214. July 20, 1868, supervisors.....	252
215. February 18, 1869, reconstruction.....	344
216. March 3, 1869, disbursing agents.....	157, 160
217. March 18, 1869, obligations.....	179
218. April 10, 1869, Indians, lands.....	372
219. April 10, 1869, reconstruction.....	344
220. December 29, 1869, reconstruction.....	344
221. January 26, 1870, Virginia.....	345
222. February 23, 1870, Mississippi.....	345
223. March 30, 1870, Texas.....	345
224. May 4, 1870, reconstruction.....	345
225. July 14, 1870, bonds.....	176, 179
226. July 14, 1870, legacy tax.....	209
227. July 14, 1870, loans.....	203
228. July 14, 1870, public debt, outstanding bonds.....	200
229. July 14, 1870, registered bonds.....	171
230. July 14, 1870, taxes, legacies, contracts.....	207
231. July 15, 1870, homesteads.....	370

	Page.
Act—Continued.	
232. July 15, 1870, Indians, lands.....	372
233. January 20, 1871, bonds called for payment.....	200
234. January 20, 1871, loans.....	203
235. February 28, 1871, accounts, supervisor of elections.....	154
236. February 28, 1871, pay of supervisors.....	153
237. March 3, 1871, claims.....	342
238. March 3, 1871, Indian treaties.....	370
239. May 8, 1871, administration, treaties.....	237
240. April 4, 1872, homesteads.....	370
241. May 3, 1872, proceeds of sales.....	45
242. May 8, 1872, construction, contracts.....	205
243. May 8, 1872, contracts.....	205, 206, 208, 212
244. May 8, 1872, legacy tax.....	205
245. May 8, 1872, proceeds of sales of old material.....	38, 43, 46, 47
246. May 8, 1872, sales, revenue cutters.....	38
247. May 8, 1872, section 5, expenses, sales, military stores.....	45
248. May 9, 1872, quoted from.....	366
249. May 9, 1872, sale of lands.....	371
250. May 11, 1872, claims.....	342
251. May 31, 1872, proceeds of sales.....	45
252. June 1, 1872, celebrations.....	144
253. June 6, 1872, executors, claims.....	211
254. June 6, 1872, moieties.....	205, 212
255. June 6, 1872, supervisors.....	253
256. June 8, 1872, advertising.....	311
257. June 8, 1872, expenses, sales, military stores.....	45
258. June 8, 1872, homesteads.....	370
259. June 8, 1872, proceeds of sales.....	45
260. June 8, 1872, quoted from.....	311
261. June 8, 1872, sale of public property.....	48
262. June 8, 1872, sale war material.....	39
263. June 8, 1872, supplies to surveying expeditions.....	38
264. December 24, 1872, executors, claims.....	211
265. February 14, 1873, civilization fund.....	371
266. March 3, 1873, claims.....	342
267. January 20, 1874, member dying, &c.....	324
268. January 20, 1874, pay of member dying, &c.....	329
269. January 20, 1874, salary of Representative.....	329
270. June 1, 1874, questions as to practice at common law.....	xxii
271. June 3, 1874, judicial officers in Utah.....	150
272. June 3, 1874, quoted from.....	150
273. June 5, 1874, celebrations.....	144
274. June 16, 1874, celebrations.....	144
275. June 16, 1874, settlements, balances.....	213
276. June 20, 1874, appropriations.....	49
277. June 20, 1874, Bureau of Accounts.....	351
278. June 20, 1874, chiefs of Bureaus, &c.....	349
279. June 20, 1874, disposition of proceeds of sale.....	49
280. June 20, 1874, permanent specific appropriations.....	220
281. June 20, 1874, proceeds of sale.....	48
282. June 20, 1874, sales, appropriations.....	55
283. June 20, 1874, sales of old material.....	36
284. June 20, 1874, section 7, quoted, as to authority to publish Revised Statutes and laws of the United States.....	v

	Page.
<i>Act—Continued.</i>	
285. June 20, 1874, settlement, balances.....	213
286. June 22, 1874, appropriations, rents.....	99
287. June 22, 1874, Indian treaties.....	370
288. June 22, 1874, net proceeds sales, disposition of.....	37, 39
289. June 22, 1874, ordnance stores.....	55
290. June 22, 1874, Revised Statutes.....	154
291. June 22, 1874, sales, munitions of war.....	38
292. June 22, 1874, sale of ordnance stores.....	41
293. June 22, 1874, sale of unserviceable war material.....	45
294. June 23, 1874, administration, treaties.....	237
295. June 23, 1874, claimants, checks.....	33
296. June 23, 1874, deposits, securities.....	63
297. June 23, 1874, disbursements for charities.....	65
298. June 23, 1874, drafts, advances.....	19
299. June 23, 1874, drafts, checks.....	35
300. June 23, 1874, duties United States attorney.....	120
301. June 23, 1874, sale of lands.....	371
302. July 22, 1874, sales of munitions of war.....	56
303. January 14, 1875, mutilated notes, coin.....	168
304. February 8, 1875, refund tax.....	131
305. February 8, 1875, special taxes.....	129
306. February 18, 1875, accounts.....	114
307. February 18, 1875, accounts, certificates.....	155
308. February 22, 1875, accounts.....	114
309. February 22, 1875, accounts for services performed.....	112
310. February 22, 1875, certification of accounts.....	154
311. February 22, 1875, marshals' fees, limitation.....	165
312. March 3, 1875, advertising.....	311
313. March 3, 1875, as to set-offs.....	XXIX, XXXVI
314. March 3, 1875, celebrations.....	144
315. March 3, 1875, chief of Bureau of Accounts.....	351
316. March 3, 1875, claims, balances.....	213
317. March 3, 1875, claim, final judgment.....	22
318. March 3, 1875, Deputy First Comptroller.....	61, 70, 249
319. March 3, 1875, disbursing clerk.....	349
320. March 3, 1875, disbursements, compensation on.....	157
321. March 3, 1875, expenses of sales.....	37, 56
322. March 3, 1875, expenses Territorial courts.....	120
323. March 3, 1875, land grants.....	370
324. March 3, 1875, marine hospitals.....	40
325. March 3, 1875, materials or supplies sold.....	38
326. March 3, 1875, pay-roll of Representatives.....	323
327. March 3, 1875, proceeds of sales.....	44
328. March 3, 1875, quoted from.....	323
329. March 3, 1875, salaries.....	326
330. March 3, 1875, salary, agents.....	251
331. March 3, 1875, salary of Representatives.....	329
332. March 3, 1875, salary, set-off.....	325
333. March 3, 1875, sale of public property.....	46
334. March 3, 1875, set-off.....	205, 206, 208
335. March 3, 1875, settlement, balances.....	213
336. March 3, 1875, Treasury Department.....	255
337. March 3, 1875, withholding payments.....	XXIX
338. February 16, 1876, celebrations.....	144

	Page.
<i>Act</i> —Continued.	
339. April 17, 1876, celebrations.....	144
340. May 1, 1876, celebrations	144
341. May 13, 1876, celebrations	144
342. June 10, 1876, Indian treaties.....	370
343. July 12, 1876, advertising.....	311
344. July 20, 1876, celebrations	144
345. August 11, 1876, sale of lands	371
346. August 15, 1876, internal revenue	253
347. August 15, 1876, misconduct in office	359
348. January 26, 1877, salaries.....	281
349. February 22, 1877, certifying accounts	154
350. February 27, 1877, advances, drafts	19
351. February 27, 1877, checks, pensioners	127
352. February 27, 1877, checks, securities.....	63
353. February 27, 1877, checks, vouchers.....	32
354. February 27, 1877, claimant, voucher, check.....	33
355. February 27, 1877, contracts	104
356. February 27, 1877, disbursing officers.....	65
357. February 27, 1877, fees.....	56
358. February 27, 1877, hospital service accounts	53
359. February 27, 1877, sale of materials or supplies	38
360. February 27, 1877, sales of old material.....	58
361. March 3, 1877, celebrations	144
362. March 3, 1877, pay, monthly	363
363. February 28, 1878, silver certificates.....	201
364. April 29, 1878, new offenses	262
365. April 29, 1878, quoted as to policy, lottery, &c	260
366. April 30, 1878, salaries	220
367. May 17, 1878, advertising.....	311
368. May 17, 1878, assignment of contracts.....	104
369. May 17, 1878, as to authority of Sixth Auditor.....	3
370. May 17, 1878, balances on mail contracts	6
371. May 17, 1878, construed.....	6, 15
372. May 17, 1878, drafts of subcontractors	123
373. May 17, 1878, payment to subcontractors	3
374. May 17, 1878, regarding mails, quoted from.....	125
375. May 17, 1878, section 2, transfer of mail contract	15
376. May 17, 1878, section 3, auditing subcontractor's accounts	5
377. May 17, 1878, section 3 cited	6
378. May 17, 1878, section 3, subcontracts with consent of Postmaster-General.....	7
379. May 17, 1878, subcontract	2
380. May 17, 1878, subcontractors	124, 125
381. June 11, 1878, District of Columbia	261, 306
382. June 11, 1878, District Commissioners	306
383. June 11, 1878, expenses, District	263
384. June 11, 1878, government, District of Columbia.....	198
385. June 11, 1878, quoted from	261, 264
386. June 11, 1878, schools, compensation	306
387. June 14, 1878, auditor's duties.....	xxvi
388. June 14, 1878, claims	137, 266
389. June 14, 1878, claims, report to Speaker	213
390. June 14, 1878, claims, Speaker, House.....	207
391. June 14, 1878, disallowances	147
392. June 14, 1878, duty of accounting officers, exhausted balances.....	22

	Page.
<i>Act</i> —Continued.	
393. June 14, 1878, rejected claims	XXVIII
394. June 17, 1878, advertising	311
395. June 19, 1878, salaries	281
396. June 19, 1878, statement, Commissioner Internal Revenue	244
397. June 20, 1878, advertising	311
398. March 1, 1879, agents.....	241, 253
399. March 1, 1879, claims	317
400. March 1, 1879, clerks, agents	247
401. March 1, 1879, internal-revenue agents	158
402. March 1, 1879, quoted from	318
403. March 1, 1879, refund of tax	129, 131, 135, 315, 318, 319, 320
404. March 1, 1879, replacement, stamps	130
405. March 1, 1879, special taxes.....	129
406. March 3, 1879, appropriations, taxes	261
407. March 3, 1879, board of health	224, 227
408. March 3, 1879, District revenues	263
409. March 3, 1879, National Board of Health	221, 223, 225
410. March 3, 1879, public health	226
411. March 3, 1879, quoted from.....	264
412. March 3, 1879, sec. 5, deductions for failure to perform	9
413. June 2, 1879, board of health	222, 223, 224, 225, 227
414. June 2, 1879, preventing disease.....	229
415. June 2, 1879, public health.....	221
416. June 2, 1879, public health, merchant vessels	226
417. June 12, 1879, advertising	311
418. June 14, 1879, board of health.....	223
419. June 21, 1879, pay, monthly	363
420. June 23, 1879, Army Regulations	46
421. June 23, 1879, sale of old material.....	39
422. July 1, 1879, board of health	223
423. May 28, 1880, Indian lands.....	366, 367, 371
424. May 28, 1880, sales of land.....	365
425. June 7, 1880, authorizing Yorktown Celebration	145
426. June 7, 1880, inviting French guests	141, 142
427. June 7, 1880, monument at Yorktown	141
428. June 9, 1880, advertising.....	311
429. June 15, 1880, pay, vouchers	363
430. June 16, 1880, administration, treaties.....	237
431. June 16, 1880, assignments	13
432. June 16, 1880, assignments in special cases	27
433. June 16, 1880, board of health.....	221, 224
434. June 16, 1880, disbursements.....	156
435. June 16, 1880, epidemics.....	227
436. June 16, 1880, Indians, lands	366, 369, 371
437. June 16, 1880, public buildings	157
438. June 16, 1880, refund purchase money	15
439. January 21, 1881, advertising	311
440. January 21, 1881, public advertising	37, 54, 56
441. February 18, 1881, Yorktown centennial anniversary.....	142
442. February 24, 1881, appropriation, salary consular officers	271
443. March 1, 1881, advertising.....	311
444. March 3, 1881, appropriations.....	214, 306
445. March 3, 1881, appropriations, officers.....	307, 308
446. March 3, 1881, appropriations, taxes	261

<i>Act—Continued.</i>	<i>Page.</i>
447. March 3, 1881, board of health	221, 224
448. March 3, 1881, counterfeiting, &c	214
449. March 3, 1881, detection of crime	262
450. March 3, 1881, disbursing claims	302
451. March 3, 1881, epidemics.	227
452. March 3, 1881, expenses	249
453. March 3, 1881, expenses of courts	152
454. March 3, 1881, Government Printing Office	98
455. March 3, 1881, Indians, lands	366, 371
456. March 3, 1881, public debt, bonds	200
457. March 3, 1881, quoted from	243, 245
458. March 3, 1881, salaries, expenses agents	243
459. March 3, 1881, violations internal revenue laws	245
460. June 7, 1881, Yorktown centennial anniversary	143
461. January 28, 1882, expenses Tenth Census	33
462. February 20, 1882, powers of attorney	33
463. April 21, 1882, lithocautic illustrations	111
464. June 30, 1882, appropriations	213, 214
465. July 1, 1882, as to authority of commissioners to make contracts	199
466. July 1, 1882, District of Columbia	198, 199
467. July 29, 1882, quoted from	275
468. July 29, 1882, relief of the citizens of Tennessee	275, 276, 277, 278, 279
469. July 29, 1882, repayment of taxes	274
470. August 5, 1882, agents' disbursements	303
471. August 5, 1882, appropriations	213, 302, 365
472. August 5, 1882, appropriations, full compensation	15
473. August 5, 1882, appropriation, President Garfield ...	372, 373, 374, 375, 377, 378, 380, 384, 385, 386
474. August 5, 1882, balance of salary	280
475. August 5, 1882, changes in offices	215
476. August 5, 1882, claims, postmaster	267
477. August 5, 1882, clerks, salaries	220
478. August 5, 1882, deficiencies	281, 282
479. August 5, 1882, deficiency of appropriations	265
480. August 5, 1882, digest of the rules	362, 363, 364
481. August 5, 1882, employment of clerks	247
482. August 5, 1882, expenses sale of lands	368
483. August 5, 1882, Indians, lands	367
484. August 5, 1882, quoted from	374, 384, 386
485. August 5, 1882, refund of tax	315, 316, 317, 318, 319, 320
486. August 5, 1882, reporter Supreme Court	296, 297, 298, 299, 301
487. August 5, 1882, reports of Supreme Court	300
488. August 5, 1882, sales of lands	366, 369
489. August 5, 1882, Secret Service	219
490. August 5, 1882, section 4 quoted as to clerks	247
491. August 5, 1882, section 4, quoted as to officers and employes	217
492. August 5, 1882, special agents	63
493. August 5, 1882, substitutes	347
494. August 5, 1882, Treasury Department	251
495. August 7, 1882, as to epidemics	xii
496. August 7, 1882, boards of health	223, 224
497. August 7, 1882, contested election cases	324
498. August 7, 1882, expenses board of health	226
499. August 7, 1882, extra pay	362

	Page.
<i>Act—Continued.</i>	
500. August 7, 1882, Freedmen's Hospital.....	397
501. August 7, 1882, National Board of Health.....	221, 222, 396
502. August 7, 1882, pay of officers and employes of House.....	364
503. August 7, 1882, preservation of public buildings.....	163
504. August 7, 1882, president board of health	225, 226
505. August 7, 1882, quarantine	229
506. August 7, 1882, quoted from	362, 364
507. August 7, 1882, salaries of officers and employes	221
508. August 7, 1882, salary of Representative.....	329
509. August 7, 1882, suppressing counterfeiting.....	219
510. March 3, 1883, adjusting salaries of postmasters.....	XXI
511. March 3, 1883, appropriations for postal service.....	XXI
512. March 3, 1883, claim referred to Court of Claims	XXXV
513. March 3, 1883, classes of accounts	354
514. March 3, 1883, Deputy Comptroller.....	285
515. March 3, 1883, tax on banks.....	407
516. March 3, 1883, tax on national banks.....	401
517. March 3, 1883, quoted.....	XXXIV
518. March 3, 1883, quoted from	285
519. June 30, 1883, appropriations.....	213, 214
520. August 5, 1882 (private), quoted from.....	316
521. Territorial, not inconsistent with the Constitution.....	150
522. To prevent frauds upon the Treasury.....	23
<i>Action—</i>	
1. Civil, as to judicial proceedings against accounting officers.....	XXXVI
2. Of legislature, meaning of.....	151
<i>Actions at Law—</i>	
1. As to forms of.....	XXVIII
<i>Acts—</i>	
1. As to, making appropriations.....	XIX
2. Jurisdiction of First Comptroller as to construction of appropriation acts	XX
3. Of Congress are paramount.....	170
4. Of Congress, as to.....	XXIII
5. Of reconstruction.....	343
6. Prescribing fees and compensations, as to	XVIII
7. Prescribing salaries, as to.....	XVIII
<i>Actual Settlers—</i>	
1. As to public lands in Kansas.....	370
<i>Additional Compensation—</i>	
1. As to.....	306,
2. Effect of provisions for, in act of August 5, 1882.....	217
3. Payment of.....	147
<i>Additional Pay.—(See Additional Compensation.)</i>	
<i>Additional trips—</i>	
1. As to carrying mails.....	2
<i>Addition—</i>	
1. As to repeal	263
<i>Adjudicated Cases—</i>	
1. Force of, as to registered bonds	290
<i>Adjustment—</i>	
1. Of accounts relating to sales of land.....	369
2. Of claims, as to.....	XXXIX
3. Of salaries of postmasters, as to.....	XXI

	Page.
<i>Administration—</i>	
1. Ancillary letters of	231
2. As to, District of Columbia	182
3. Principles of, stated	236
4. Upon personal estate	233
5. Where and when ancillary	182
<i>Administration of Estate—</i>	
1. Difference between a claim against Government and a Treasury draft..	233
<i>Administrator—(See Executor; Foreign Guardian.)</i>	
<i>Administrator—</i>	
1. Appointed in a foreign country	231
2. Appointed in District of Columbia, authority of	231
3. As to claim by	XXXVII
4. As to place of appointment of	231
5. As to salary due deceased public officer.....	270
6. In District of Columbia, authority of.....	231
7. Powers, duties, and responsibilities of, as to bonds	194
8. Recovery of debt by	182
<i>Administrators—</i>	
1. Of deceased executors and administrators.....	191
2. Question between rival.....	234
<i>Admiralty—</i>	
1. As to	XXVIII
<i>Advances—</i>	
1. Of money to disbursing officers.....	XX
2. Of money to disbursing officer, as to	18
3. Of public money.....	66
4. Postal service	18
5. To disbursing officers	14
<i>Adverse Claimants—</i>	
1. Rights of, in Treasury Department.....	202
<i>Advertising—</i>	
1. Claim for	309
2. For public supplies; requirements as to	100
3. In District of Columbia.....	37, 54
4. Revised Statutes, as to	311
<i>Advertisements—</i>	
1. As to contracts	105
2. Ordered for publication.....	311
<i>Affidavit—</i>	
1. Of claimant, as to.....	XXX
2. Of complainant, disposition of	92
3. Of John D. Sanborn, as to unpaid legacy tax.....	206
4. Quoted from, in Walsh's case	124
5. To be used as evidence	122
<i>Affirmation—(See Oath.)</i>	
<i>Affirmatives—</i>	
1. In statutes introducing a new rule, imply negatives	161
<i>Affirmative Statutes—</i>	
1. Repealing power of.....	160
<i>Affirmative Words—</i>	
1. Sometimes imply a negative	162
<i>Agency-Delegation case.....</i>	60
<i>Agency—</i>	
1. As to the public health	230
2. Laws of official and of private	245

	Page.
<i>Agent—</i>	
1. Acting under power of attorney cannot receive payment of claim from a disbursing officer	14
2. Of contractor for carrying mails.....	3
<i>Agents—(See Pension Agents.)</i>	
1. And officers who have no districts.....	158
2. For disbursing appropriations for public buildings.....	159
3. Of corporations.....	31
4. Of Post-Office Department	158
5. Of Treasury Department, as to abandoned or captured property taken by	XXXVIII
6. Postmasters as disbursing.....	155
7. Right of Department to employ and pay.....	434
<i>Agreement—(See Assignment, Transfer, Lien.)</i>	
1. Power to ratify an, can only exist when there is an original power to make it.....	107
<i>Agricultural Department—</i>	
1. As to	360
<i>Agricultural Products—</i>	
1. Sales of.....	55
<i>Agricultural Report—</i>	
1. Authorization of publication of.....	99
<i>Aid—</i>	
1. For State and local boards of health	225
<i>Alien Husband—</i>	
1. Rights of	170
<i>Allegiance—</i>	
1. As to direct taxes.....	337
<i>Allotments—</i>	
1. Of officers paid.....	27
<i>Allowance—</i>	
1. By Commissioner of Internal Revenue, may be impeached by courts....	127
2. Made by Commissioner of Internal Revenue, as to.....	XXXII
3. Or statement of a claim.....	13
<i>Allowances—</i>	
1. For extra services Schedule "A" as to illness and burial of late President Garfield.....	381
2. Growing out of the illness and burial of late President Garfield.....	372
3. To district attorneys	269
<i>Ambiguity—</i>	
1. Or doubtful construction in revenue acts.....	283
<i>Ambiguous Provisions—</i>	
1. Of statutes, construction of.....	162
<i>Ambiguous Statutes—</i>	
1. As to construction of.....	315
<i>Amendment—</i>	
1. As to appropriations.....	338
<i>Amendments—</i>	
1. And changes in bills on their passage through Congress.....	219
<i>American People—</i>	
1. Celebration of.....	143
<i>American Seamen—</i>	
1. Destitute at foreign ports.....	26
<i>American Usage—</i>	
1. Social and public.....	144

	Page.
<i>Amount—</i>	
1. Due contractors, power of Sixth Auditor to determine.....	4
2. Of salary.....	19
3. Payable to marshal for fees and mileage.....	164
<i>Amounts Awarded—</i>	
1. To claimants as to illness and burial of late President Garfield.....	387
<i>Amounts Certified—</i>	
1. To be paid on account of the illness and burial of late President Garfield.	387
1. Stated as due to claimants as to.....	xx
<i>Ammunition—</i>	
1. Sales of obsolete and unserviceable.....	55
<i>Ancillary Administration—</i>	
1. Where appointed.....	183
<i>Ancillary Letters—</i>	
1. Of administration in the District of Columbia	231
2. When required	235
<i>Anniversary—</i>	
1. Of the battle of Yorktown, October 19, 1881.....	141
<i>Annual Appropriation—(See Appropriation.)</i>	
1. As to.....	337
<i>Annual Appropriations—</i>	
1. As to.....	xix
<i>Annual Report—</i>	
1. Letter of Secretary of the Treasury, as to permanent legislation.....	303
<i>Annual Salaries—</i>	
1. Appropriations for.....	215
<i>Annual Salary—</i>	
1. Of some offices increased.....	215
<i>Annual Sale—</i>	
1. Of old material and condemned office property.....	37
<i>Annual Statements—</i>	
1. To be submitted to Congress.....	242
<i>Annulment—</i>	
1. Of contract for carrying mails.....	5
<i>Anomalous Statutes—</i>	
1. Authorizing payments from money which has not been deposited.....	368
<i>Ante-Nuptial Contracts—</i>	
1. As to property.....	175
<i>"Any Claims"—</i>	
1. Meaning of expression.....	16
<i>Appeal—</i>	
1. As to the right of.....	xxi
2. From decision of Sixth Auditor to First Comptroller.....	310
3. From Sixth Auditor as to	xix
4. From Sixth Auditor, jurisdiction of First Comptroller in relation to....	5
5. From Sixth Auditor, jurisdiction of First Comptroller over.....	xx
6. From the Sixth Auditor.. ..	123
7. Mail contractor may appeal to First Comptroller from decision of Sixth Auditor	1
8. Of Postmaster-General from Sixth Auditor.....	5
9. Right of.....	269
<i>Appeal Case—</i>	
1. Dorsey's.....	1
<i>Appendix</i>	399
<i>Appendixes—</i>	
1. To decisions of First Comptroller, as to.....	xx

Application—

1. Of husband of insane alien wife for appointment of guardian, committee, or trustee 171

Appointment—

1. Of administrator 183
2. Of a clerk's substitute 345
3. Of clerks to investigate 241
4. Of officers and employes, how made 346

Appointments—

1. Should be delayed or omitted 114

Appraisers of Customs—

1. Districts assigned to 158

Appraisers of Merchandise—

1. As to 158

"Appropriated"—

1. Effect of absence of expression, in appropriation act 335

Appropriation Act—

1. As to payment of expenses of sales of land 365
2. Office and salary, existing by terms of 217

Appropriation Acts—

1. As to construction of xx
2. In relation to Indians 366

Appropriation—

1. Application to objects not authorized 148
2. Apt words to make an 331
3. As to civilization fund 366
4. Consular and diplomatic 271
5. False description in act making 265
6. For detection of frauds 249
7. For expenses of Tenth Census 33
8. For National Board of Health 221
9. For office of Supreme Court reporter 296
10. For payment of coupon bonds always available 35
11. For the erection of a monument at Yorktown 141
12. In aid of State and local boards of health 225
13. Limits of officer's authority over disbursement of 147
14. Mode of disbursement of 296
15. What is a legal 333

Appropriation—Extension Case—

1. In this case the reference on page 215 to 4 Opinions should be to page 123.

Appropriations—

1. Amount and per cent. of for expenses of District of Columbia 199
2. As to District of Columbia 264
3. As to public health 225
4. As to the various kinds of XIX
5. Direct-tax acts considered as to 331
6. Exhausted balances 22
7. Expended under direction of National Board of Health 226
8. Extension of, beyond fiscal year 213
9. For courts in Territories 152
10. For expenses of the Government, as to 362
11. For fiscal year 1883, terms and effect of act making 216
12. For general purposes, use of 219
13. For Government Printing Office 94

	Page.
<i>Appropriations—Continued.</i>	
14. For public buildings, disbursement of.....	159
15. For public schools District of Columbia.....	306
16. Intention of Congress as to permanent specific.....	331
17. Permanent specific.....	214
18. Questions as to whether acts make.....	XIX
19. Style and title of act making.....	335
20. Use of in board of health case.....	397
<i>Appropriation Warrant—</i>	
1. Disposition of.....	217
<i>Apt words—</i>	
1. As to appropriations.....	331
<i>Arbitration—</i>	
1. As to payments to a subcontractor for carrying mails.....	9
<i>Arbitrator—</i>	
1. Cannot devolve his duty upon another.....	76
2. Delegation of duty by.....	347
<i>Argument—</i>	
1. Of Hon. E. C. Camp in Evans's case.....	112
2. Of Richard Crowley in Crowley's case.....	355
3. Of William H. Trescott in direct-tax case.....	332
<i>Army—</i>	
1. As to acts of, in suppressing the rebellion.....	XXXVIII
2. As to property destroyed or appropriated by.....	XXXVIII
<i>Army Contractors—</i>	
1. Assignments of.....	127
<i>Army of the United States—</i>	
1. Regulations of.....	36
<i>Army Regulations—</i>	
1. Of 1863, condemned military stores.....	45
2. Of 1863, par. 1032, expenses of sales of military stores.....	45
3. Of 1863, referred to.....	45
4. Of 1881, par. 1622, proceeds of sales of public property.....	39
5. Of 1881, par. 1623, net proceeds of sales of public property.....	39
6. Of 1881, par. 1623, sales of Government property.....	56
7. Of 1881, par. 1624, deposits of proceeds of sales.....	39
8. Of 1881, par. 1625, condemned military stores.....	45, 55
9. Of 1881, par. 1625, condemned military supplies.....	39
10. Of 1881, par. 1625, sale of condemned stores.....	36
11. Of 1881, par. 1626, furnishing stores or property.....	39
12. Quotations from.....	39
13. Regarding sale of condemned supplies.....	55
<i>Arrangement—(See Assignment.)</i>	
<i>Arrest—</i>	
1. Warrant of.....	269
<i>Arthur, Chester A.—</i>	
1. Copy of order of, as President, as to duties of First Comptroller and Deputy First Comptroller.....	294
<i>Articles of Amendment—</i>	
1. To the Constitution, as to.....	342
<i>Article II—</i>	
1. Section 4, of the Constitution, as to meaning of, "officer".....	355
2. Section 4, of the Constitution referred to.....	355
<i>Article VI—</i>	
1. Section 3, of the Constitution referred to.....	346

	Page.
<i>Assent—</i>	
1. Of parties.....	338
2. To contract, as to withdrawing.....	177
<i>Assessment—</i>	
1. And collection of duties and taxes.....	242
2. Circular as to.....	275
3. Of contract for carrying mails.....	5
4. Of deficiency tax.....	317
5. Of legacy tax, return for.....	206
6. Of taxes on lands.....	334
<i>Assessment Division—</i>	
1. Establishment of.....	276
<i>Assessments—</i>	
1. As to taxes.....	319
<i>Assets—</i>	
1. Administration of.....	191
2. Debts and leases.....	235
3. Of the first estate, as to unadministered.....	195
<i>Assignee—</i>	
1. As to payments to.....	XLII
2. Of a chose in action.....	286
<i>Assignment—</i>	
1. After issuing of warrant for payment of claim.....	35
2. As to disposition of bonds.....	194
3. By officer, of future salary void.....	14
4. By operation of law, force of, out of the territory of the law-maker.....	237
5. By Treasury employé, of accruing salary forbidden.....	17
6. Execution and acknowledgment of.....	203
7. Execution of.....	184
8. Impeaching validity of.....	XLII
9. Imperfect in a registered bond.....	286
10. In blank, as to title to registered bond.....	296
11. Of a debt.....	289
12. Of bonds.....	23
13. Of bonds by executor to himself.....	184
14. Of bonds or coupons.....	35
15. Of certificates.....	289
16. Of certificates by masters of vessels.....	26
17. Of choses in action as to registered bonds.....	292
18. Of claims.....	15
19. Of compensation not yet due.....	122
20. Of Government registered bonds by wife.....	170
21. Of negotiable securities, right of wife to make.....	170
22. Of one officer to perform the duties of another.....	284
23. Of part interest in bonds.....	202
24. Of registered bond, execution and acknowledgment.....	288
25. Of registered bond to be acknowledged.....	287
26. Of salaries, compensations, and claims.....	XX
27. When right to, is based on an equitable title.....	XL
<i>Assignments—</i>	
1. After allowance of claim.....	35
2. And transfers of claims.....	13
3. As to.....	23
4. As to claims.....	348
5. By foreign succession.....	184

	Page.
<i>Assignments—Continued.</i>	
6. By implication.....	27
7. By operation of law.....	13, 25
8. By representatives and successors.....	184, 195
9. Contests over validity of.....	15
10. Difference between powers of attorney and.....	30
11. For the benefit of creditors.....	13, 27
12. In blank, of bonds pass title by delivery.....	202
13. In blank of registered bonds, effect of.....	200
14. Of Army contractors.....	127
15. Of claims against the United States, as to.....	XLII
16. Of claims, ascertaining validity of.....	17
17. Of claims should not be recognized.....	15
18. Of claims, when void.....	15
19. Of contracts with Indians may be made.....	15
20. Of judgments against United States.....	13
21. Of salaries, as to validity of.....	34
22. Of transfers of mail contracts.....	6
23. Under act May 8, 1792.....	13
24. Under act of June 30, 1864.....	13
25. Under act June 16, 1880.....	13
26. When not void.....	29
27. Whether recognized in Court of Claims.....	13
28. Which are not within the statute.....	26
29. Wisdom of statute against.....	125
<i>Assignors and assignees—</i>	
1. Rights between.....	15
<i>Assigns—</i>	
1. As to registered bonds.....	255
<i>Assistant Appraisers of Customs—</i>	
1. Districts assigned to.....	153
<i>Assistant Collectors—</i>	
1. Districts assigned to.....	153
<i>Assistant Inspectors—(See Inspectors.)</i>	
<i>Assistant Messengers—(See Messengers.)</i>	
<i>Assistant Postmaster-General—(See Postmaster-General.)</i>	
<i>Assistant Secretary—</i>	
1. Delegated to sign certain warrants.....	67
2. Question raised by, as to account of Richard Crowley.....	356
3. Reply of the Comptroller's letter as to per diem fee.....	202
4. Treasury, additional duties of.....	67
5. Treasury, duties of.....	67
6. Treasury, office of, when created.....	67
<i>Assistant Treasurers—(See Treasurer.)</i>	
<i>Assistant Treasurer.....</i>	XXVII
1. Liability of, as to pensions.....	155
<i>Assistant Treasurers—</i>	
1. As to districts.....	155
<i>Associations—</i>	
1. Charitable and other.....	33
<i>Atherton & Co.'s Case.....</i>	315
1. As to use of material for distillation.....	395
<i>Atherton, J. M.—</i>	
1. Party in Atherton & Co.'s case.....	315
<i>Attachment—</i>	
1. And garnishee process.....	27

	Page.
<i>Attorney—(See Administrator ; Agent ; Assignee ; Executor.)</i>	
<i>Attorney—</i>	
1. A. L. Merriman, in Halstead's case.....	232
2. Charles E. Hovey, in Walsh's case.....	126
3. Claims collected by	13
4. George L. Douglass, for Sanborn	208
5. George L. Douglass, in Malakof Bitters case.....	130
6. Robert G. Ingersoll, in Dorsey's appeal case.....	4
7. Suspension or disbarment of	313
8. William Henry Trescot, for State of South Carolina	332
9. W. Lilley, for Taylor in Dorsey's appeal case.....	3
10. W. S. Bush, in Dorsey's appeal case.....	4
11. With consent of proper officers claimant may change his.....	314
<i>Attorney-General Brewster—</i>	
1. Letter of, to First Comptroller referred to	149
<i>Attorney-General Caleb Cushing—</i>	
1. Opinion of, as to legal signature quoted.....	69
<i>Attorney-General Charles Devens—</i>	
1. As to unperformed contracts	102
2. Opinion of, regarding exchange of printing-presses	53
<i>Attorney-General Crittenden—</i>	
1. Opinion of, as to contracts.....	102
<i>Attorney-General Wirt—</i>	
1. Discussion by, as to meaning of signature	68
2. Quoted as to legal signature.....	69
<i>Attorney-General—</i>	
1. As to opinions of.....	xv
2. Circular of, as to warrants.....	92
3. Claim of Richard Crowley approved by	357
4. Opinion of, as to local assets quoted.....	240
5. Opinion of, as to postmasters as disbursing agents	156
6. Opinion of, July 21, 1882, referred to.....	359
7. Opinion of, may be required by the head of any Department.....	xvi
8. Opinion of, regarding section 3477, Revised Statutes.....	29
9. Opinion of, vol. 1, p. 528, accounting officers.....	147
10. Opinion of, vol. 1, p. 598, accounts, balances	141
11. Opinion of, vol. 1, p. 624, accounting officers.....	147
12. Opinion of, vol. 1, p. 624, accounts, balances.....	141
13. Opinion of, vol. 1, p. 624, powers of President.....	228
14. Opinion of, vol. 1, p. 670, signature of Secretary.....	68
15. Opinion of, vol. 1, p. 679, accounts, balances.....	141
16. Opinion of, vol. 1, pp. 681-684, equitable claims.....	xlii
17. Opinion of, vol. 1, pp. 681-684, relation of executive to judicial authority.....	xxxviii
18. Opinion of, vol. 1, p. 684, rights.....	196
19. Opinion of, vol. 1, p. 699, accounting officers.....	147
20. Opinion of, vol. 2, p. 209, referred to.....	238
21. Opinion of, vol. 2, p. 259, duties of officers, advertising.....	101
22. Opinion of, vol. 2, p. 259, public contracts.....	97
23. Opinion of, vol. 2, p. 504, husband, wife, domicile, securities.....	174
24. Opinion of, vol. 2, p. 504, referred to.....	174
25. Opinion of, vol. 2, p. 625, accounts, balances.....	141
26. Opinion of, vol. 2, p. 625, accounting officers.....	147
27. Opinion of, vol. 2, p. 650, accounting officers.....	147
28. Opinion of, vol. 2, p. 650, accounts, balances.....	141
29. Opinion of, vol. 2, p. 650, as to accounts	xxxii

	Page.
<i>Attorney-General—Continued.</i>	
30. Opinion of, vol. 2, p. 714, exigencies of public service.....	114
31. Opinion of, vol. 3, p. 1, accounting officers, and accounts.....	140, 141, 147
32. Opinion of, vol. 3, pp. 1, 15, 18, referred to.....	140, 141
33. Opinion of, vol. 3, p. 13, appropriations, moieties.....	207
34. Opinion of, vol. 3, p. 15, accounting officers.....	147
35. Opinion of, vol. 3, p. 15, accounts, balances.....	140, 141
36. Opinion of, vol. 3, p. 17, accounting officers.....	147
37. Opinion of, vol. 3, p. 17, appropriations, vouchers.....	147
38. Opinion of, vol. 3, p. 18, accounting officers.....	147
39. Opinion of, vol. 3, p. 18, accounts, balances.....	140, 141
40. Opinion of, vol. 3, p. 18, appropriation, vouchers.....	147
41. Opinion of, vol. 3, p. 18, disallowances.....	147
42. Opinion of, vol. 3, p. 29, aid to accounting officers.....	XXXIV
43. Opinion of, vol. 3, p. 30, executor demanding payment of claim.....	XLI
44. Opinion of, vol. 3, p. 148, accounting officers.....	147
45. Opinion of, vol. 3, p. 329, rights of claimants.....	XL
46. Opinion of, vol. 3, pp. 531 and 718, authority, executive, judicial....	XXXVIII
47. Opinion of, vol. 3, pp. 531 and 718, validity of claims.....	XLI
48. Opinion of, vol. 4, p. 80, accounting officers.....	147
49. Opinion of, vol. 4, p. 123, salaries.....	215
50. Opinion of, vol. 4, p. 248, agency.....	246
51. Opinion of, vol. 4, p. 248, commissioners, agents.....	248, 249
52. Opinion of, vol. 4, p. 248, powers of President.....	XXIII
53. Opinion of, vol. 4, p. 249, accounting officers.....	147
54. Opinion of, vol. 4, p. 528, terms of Supreme Court.....	150
55. Opinion of, vol. 5, p. 85, claim.....	16, 18, 19
56. Opinion of, vol. 5, p. 85, rights involved in claims.....	XXXVIII
57. Opinion of, vol. 5, p. 86, claimants.....	XXXIV, XI
58. Opinion of, vol. 5, p. 273, limitations of compensation.....	305
59. Opinion of, vol. 5, p. 387, accounts, balances.....	140
60. Opinion of, vol. 5, p. 566, advertising, duty of officers.....	101
61. Opinion of, vol. 5, p. 566, contracts.....	102
62. Opinion of, vol. 5, p. 678, expenses of courts.....	152
63. Opinion of, vol. 6, p. 81, rights.....	196
64. Opinion of, vol. 6, p. 220, authority of President.....	XXIII
65. Opinion of, vol. 6, p. 388, expenses of courts.....	152
66. Opinion of, vol. 6, p. 406, contracts, advertising.....	101
67. Opinion of, vol. 6, p. 557, debtor, administration.....	235
68. Opinion of, vol. 6, p. 559, administration, District.....	235
69. Opinion of, vol. 6, p. 560, debts.....	240
70. Opinion of, vol. 6, p. 600, in regard to Presidential powers.....	XXIII
71. Opinion of, vol. 7, p. 80, executive, judicial authority.....	XXXVIII
72. Opinion of, vol. 7, p. 80, remedies as to claims.....	XLI
73. Opinion of, vol. 7, p. 240, regulations, bonds.....	154
74. Opinion of, vol. 7, p. 242, administrations.....	235
75. Opinion of, vol. 7, p. 242, referred to.....	235
76. Opinion of, vol. 7, p. 272, administrations.....	235
77. Opinion of, vol. 7, p. 303, compensation for services.....	112
78. Opinion by, vol. 7, p. 303, expenses of courts.....	152
79. Opinion of, vol. 7, p. 303, frauds, ambiguities.....	24
80. Opinion of, vol. 7, p. 303, salaries.....	215
81. Opinions of, vol. 7, pp. 439, 488, and 729, duties of Sixth Auditor.....	4
82. Opinion of, vol. 7, p. 453, authority of President.....	235
83. Opinion of, vol. 7, p. 594, authority of President.....	235

	Page.
<i>Attorney-General—Continued.</i>	
84. Opinion of, vol. 7, p. 597, signatures.....	70
85. Opinion of, vol. 7, p. 610, expenses of courts.....	152
86. Opinion of, vol. 8, p. 39, head of Department.....	277
87. Opinion of, vol. 8, p. 98, administration, treaties.....	237
88. Opinion of, vol. 8, p. 409, accounts.....	XXXII
89. Opinion of, vol. 9, p. 19, advertising, contracts, appropriations.....	100
90. Opinion, vol. 9, p. 34, account once heard.....	XXXI
91. Opinion of, vol. 9, p. 35, as to accounts.....	XXXII
92. Opinion of, vol. 9, p. 36, as to Treasury Department.....	XVI
93. Opinion of, vol. 9, p. 36, quoted from.....	XVI
94. Opinion of, vol. 9, p. 170, district attorneys, compensation.....	269
95. Opinion of, vol. 9, p. 188, claims.....	15
96. Opinion of, vol. 9, p. 188, transfers of claims.....	17
97. Opinion of, vol. 9, p. 188, warrants, assignments.....	29
98. Opinion of, vol. 9, p. 190, claims.....	21
99. Opinion of, vol. 9, p. 192, claims.....	21
100. Opinion of, vol. 9, p. 209, administration.....	238
101. Opinion of, vol. 9, p. 270, evidence.....	283
102. Opinion of, vol. 9, p. 313, bonds, interest.....	287
103. Opinion of, vol. 9, p. 413, purchases of Treasury notes.....	287
104. Opinion of, vol. 9, p. 413, referred to.....	287
105. Opinion of, vol. 9, p. 430, accounts, balances.....	141
106. Opinion of, vol. 9, p. 524, as to powers of President.....	XXIII
107. Opinion of, vol. 9, p. 602, advertising, contracts, appropriations.....	100
108. Opinion of, vol. 10, p. 4, subletting contracts.....	6
109. Opinion of, vol. 10, p. 48, accounts, balances.....	140
110. Opinion of, vol. 10, p. 74, as to powers of President.....	XXIII
111. Opinion of, vol. 10, p. 198, correcting accounts.....	XXXII
112. Opinion of, vol. 10, p. 235, as to accounts.....	XXXII, XXXIII
113. Opinion of, vol. 10, p. 235, correcting balances.....	XXXII
114. Opinion of, vol. 10, p. 259, as to accounting officers.....	XXV
115. Opinion of, vol. 10, p. 259, reopening accounts.....	XXXI
116. Opinion of, vol. 10, p. 262, public contracts.....	97
117. Opinion of, vol. 10, p. 416, contracts.....	102
118. Opinion of, vol. 10, p. 423, contracts.....	102
119. Opinion of, vol. 10, p. 438, compensation.....	308
120. Opinions of, vol. 11, p. 5, as to being a law adviser.....	XVI
121. Opinion of, vol. 11, p. 5, quoted from.....	XVI
122. Opinions of, vol. 11, p. 6, as to advice to an Auditor.....	XVII
123. Opinion of, vol. 11, p. 6, quoted from.....	XVII
124. Opinion of, vol. 11, p. 7, as to claims.....	XXXIV
125. Opinion of, vol. 11, p. 7, claimants, rights of.....	XL
126. Opinion of, vol. 11, p. 287, exigencies of public service.....	114
127. Opinion of, vol. 11, p. 287, official term.....	116
128. Opinion of, vol. 12, p. 66, referred to.....	XXVIII
129. Opinion of, vol. 12, p. 139, official term.....	116
130. Opinion of, vol. 12, p. 449, tenure of office.....	119
131. Opinion of, vol. 12, p. 457, tenure of office.....	119
132. Opinion of, vol. 12, p. 469, tenure of office.....	119
133. Opinion of, vol. 13, p. 148, accounts, balances.....	141
134. Opinion of, vol. 14, p. 104, commissioners, compensations.....	269
135. Opinion of, vol. 14, p. 263, incumbents' successors.....	115
136. Opinion of, vol. 14, p. 406, salaries.....	215
137. Opinion of, vol. 14, p. 412, as to accounts.....	XXXII

Attorney-General—Continued.

Page.

138. Opinion of, vol. 14, p. 419, accounting officers	147
139. Opinion of, vol. 14, p. 419, accounts, balances.....	140, 141
140. Opinion of, vol. 14, p. 420, authority to sell old material.....	41
141. Opinion of, vol. 14, p. 577, construction of statutes.....	52
142. Opinion of, vol. 14, p. 577, contracts.....	102
143. Opinion of, vol. 14, p. 681, traveling expenses.....	164
144. Opinion of, vol. 14, p. 683, traveling expenses.....	164
145. Opinion of, vol. 15, p. 3, chief clerk First Comptroller's Office.....	70
146. Opinion of, vol. 15, p. 3, duties of deputies.....	81
147. Opinion of, vol. 15, p. 198, referred to.....	XXXIII
148. Opinion of, vol. 15, p. 23, rescinding contracts.....	102
149. Opinion of, vol. 15, p. 62, tenure of office.....	119
150. Opinion of, vol. 15, p. 90, principal agents.....	82
151. Opinion of, vol. 15, p. 139, claims.....	16
152. Opinion of, vol. 15, p. 139, prosecuting claims.....	XXVIII
153. Opinion of, vol. 15, p. 187, officers.....	307
154. Opinion of, vol. 15, p. 198, as to accounts.....	XXXIII
155. Opinion of, vol. 15, p. 198, revoking drafts.....	XXVIII
156. Opinion of, vol. 15, p. 198, settlements of claims.....	4
157. Opinion of, vol. 15, p. 221, judgments.....	28
158. Opinion of, vol. 15, p. 221, regarding judgments in Court of Claims, quoted	28
159. Opinion of, vol. 15, p. 243, exigency contracts.....	98
160. Opinion of, vol. 15, p. 253, authority regarding contracts.....	97
161. Opinion of, vol. 15, p. 255, duties of officers, advertising.....	101
162. Opinion of, vol. 15, p. 255, rescinding contracts.....	102
163. Opinion of, vol. 15, p. 256, exigency contracts.....	98
164. Opinion of, vol. 15, p. 271, regarding section 3477, Revised Statutes, quoted	27
165. Opinion of, vol. 15, p. 271, transfer of unliquidated claims.....	27
166. Opinion of, vol. 15, p. 288, advances, drafts.....	19
167. Opinion of, vol. 15, p. 303, drafts, advances.....	19
168. Opinion of, vol. 15, p. 322, agency, authority.....	303
169. Opinion of, vol. 15, p. 322, Bureau of Engraving and Printing; old ma- terial	53
170. Opinion of, vol. 15, p. 322, compensation.....	163
171. Opinion of, vol. 15, p. 322, disposition of proceeds of sale.....	41
172. Opinion of, vol. 15, p. 322, proceeds of Government property.....	38
173. Opinion of, vol. 15, p. 322, recognizing power.....	342
174. Opinion of, vol. 15, p. 322, sales of marine hospitals.....	56
175. Opinion of, vol. 15, p. 322, sales of old material.....	59
176. Opinion of, vol. 15, p. 322, referred to.....	59
177. Opinion of, vol. 15, p. 322, special agents.....	159
178. Opinion of, vol. 15, p. 323, advertising, sales.....	54
179. Opinion of, vol. 15, p. 357, settlements, balances.....	213
180. Opinion of, vol. 15, p. 419, rescinding contracts.....	102
181. Opinion of, vol. 15, p. 481, rescinding contracts.....	102
182. Opinion of, vol. 15, p. 523, referred to.....	311
183. Opinion of, vol. 15, p. 527, advertising.....	313
184. Opinion of, vol. 15, p. 527, referred to.....	313
185. Opinion of, vol. 15, p. 528, legislation.....	311
186. Opinion of, vol. 15, p. 539, valid contracts.....	102
187. Opinion of, vol. 15, p. 594, advertising.....	311
188. Opinion of, vol. 16, p. 64, mail contracts.....	4

	Page.
<i>Attorney-General—Continued.</i>	
189. Opinion of, vol. 16, p. 261, transfers and assignments.....	126
190. Opinion of, vol. 16, p. 262, assignment of claims.....	33
191. Opinion of, vol. 16, p. 262, contracts, claims.....	21
192. Opinion of, vol. 16, p. 262, warrants, assignments.....	29
193. Opinion of, vol. 16, p. 263, claims	15
194. Opinion of, vol. 16, p. 263, warrants, assignments.....	29
195. Opinion of, vol. 16, p. 367, relation of judicial to executive authority..	xxxviii
196. Opinion of, vol. 16, p. 494, administrations	238
197. Opinion of, vol. 16, p. 568, official term.....	116
198. Who may perform duties of.....	284
<i>Attorney of Record—(See Attorney.)</i>	
<i>Attorneys—</i>	
1. As to.....	xxvii
2. George L. Douglass and John W. Douglass, for Atherton & Co.....	316
<i>Attorney's Fee—(See Lien.)</i>	
<i>Auditing Officers—</i>	
1. Claims which are to be examined by	16
2. Original jurisdiction of, defined by statute.....	xxvi
<i>Auditor—</i>	
1. As to appeal from Sixth.....	xix
2. Of the District, as to moieties.....	260
<i>Auditor of the Treasury for the Post-Office Department—(See Sixth Auditor.)</i>	
<i>Auditor, Sixth—(See Sixth Auditor.)</i>	
<i>Auditors—</i>	
1. Duties and powers of	xvii
2. Duties of, as to claims and accounts.....	xxvi
3. Force of opinions and decisions by.....	xvii
4. Regarding accounts of disbursing officers.....	28
5. Valuable and learned labors of, as to.....	xvii
<i>Authorities—</i>	
1. For receiving payment of claims when void.....	16
<i>Authority—</i>	
1. As to appointment of clerk's substitute.....	345
2. As to inspectors and revenue agents.....	251
3. For making advances of money	xx
4. For selling old material.....	37
5. General, and a separate particular.....	160
6. Given expressly to one excludes all others.....	63
7. Given, includes means of executing it.....	52
8. Given to legislature of New Mexico by Congress.....	150
9. Given to President to use money for a particular purpose.....	225
10. Of accounting officers	135
11. Of Assistant Surgeon-General.....	84
12. Of adjudicated cases	116
13. Of Commissioners of District of Columbia to make contracts.....	198
14. Of court or officer as to ratifying acts of marshals holding over.....	111
15. Of First Comptroller in relation to countersigning warrants.....	xx
16. Of First Comptroller, judicial and ministerial	85
17. Of judge, repeal of	154
18. Of officers of the Post-Office Department over Sixth Auditor.....	1
19. Of Postmaster-General as to contracts for carrying mails	1
20. Of Secretary of Treasury to make regulations for the redemption of bonds	201
21. Of Sixth Auditor as to mail contracts.....	1

	Page.
<i>Authority—Continued.</i>	
22. Of supreme court of the District of Columbia to issue letters of administration.....	234
23. Of the President as to health appropriations.....	230
24. Plenary, as to.....	149
25. Purely personal, cannot be delegated to another.....	63
26. Relation of executive to judicial.....	XXXVIII
27. To appoint revenue agents.....	246
28. To detail clerks to investigate frauds	249
29. To make a contract.....	100
30. To make transfer on the books of Treasury Department, what constitutes.....	203
31. To take oath of office.....	346
<i>Awards—</i>	
1. Certificate of, as to illness and burial of late President Garfield	377
B.	
<i>Bail—(See Arrest, Imprisonment.)</i>	
<i>Bail—</i>	
1. As to commissioners, per diem.....	270
<i>Bailment—</i>	
1. Contract of.....	135
<i>Balance—</i>	
1. Certified by Comptroller analogous to judgment or decree	XXX
2. Due claimant, certificate of, may be corrected before final payment.....	XXXI
3. Due Eugene Taylor for carrying mails.....	3
4. For payment, certified after appropriation.....	213
5. Improperly certified	205
6. Of contract price, disposition of.....	5
7. Of salary due, disposition of	271
8. Satisfaction of, by set-off.....	XXXIII
<i>Balances—</i>	
1. Allowed and certified.....	136
2. Authority of Sixth Auditor in certifying	1
3. Certification of.....	213
4. Certified against executive officers.....	XXXIX
5. In favor of Sanborn suspended.	213
6. Of accounts duly certified.....	28
7. Of claims which are to be certified by Comptroller	16
<i>Banking Institutions—</i>	
1. In Great Britain, indorsements of incorporated.....	191
<i>Bank Note—</i>	
1. Recovery of value of destroyed.....	169
<i>Bank Notes—</i>	
1. Trover will lie against finder of.....	169
<i>Banks—</i>	
1. And their depositors, rule as between	157
2. Usage of, in paying checks.....	155
<i>Bar—</i>	
1. As to claims.....	20
<i>Barnett's Case.</i>	200
<i>Barnett, W. H.—</i>	
1. Party in Barnett's case.....	200
<i>Bates, Edward—</i>	
1. Attorney-General, quoted as to contracts.....	101

	Page.
<i>Bayley, S. P.—</i>	
1. Party in seaman relief case	138
<i>Bearer—</i>	
1. Whole bond payable to	202
<i>Beneficiaries—</i>	
1. Of the fund appropriated for sanitary purposes	226
<i>Bill of Interpleader—</i>	
1. As to registered bonds	191, 286
<i>Bills—</i>	
1. For expenses of detection.....	245
2. Indorsed in name of husband by wife	80
<i>Bills of Exchange—</i>	
1. As simple contract debts.....	235
2. As to salary of ministers and consuls abroad	26
<i>Bitters—</i>	
1. And spirits enumerated as articles subject to stamp tax.....	134
2. As to.....	130
<i>Black, Jeremiah S.—</i>	
1. Attorney-General, quoted regarding claims.....	21
2. Opinion of, as to duty of Attorney-General.....	XVI
<i>Blank Assignments—</i>	
1. Validity of	202
<i>Blank Indorsements—</i>	
1. Authority to agent under	202
<i>Blood Money—</i>	
1. Paid by clerks to brokers.....	17
<i>Blue Book—</i>	
1. Of the Bahamas, as to errors in statutes.....	283
<i>Board of Audit—</i>	
1. As to illness and burial of late President Garfield.....	372
<i>Board of Health Case.....</i>	221
<i>Board of Health—</i>	
1. Act establishing, quoted from as to National.....	221
2. Appropriation for National.....	221
3. As to use of appropriations for.....	396
4. Operations, and recommendations to Congress.....	226
<i>Board of Visitors—</i>	
1. Government hospitals.....	59
<i>Boards of Health—</i>	
1. State and local.....	221
<i>Bonded Officers—</i>	
1. As agent to disburse money.....	155, 159
<i>Bond—</i>	
1. As to redemption of half of.....	201
2. Fiscal officers of the Treasury Department required to give a.....	65
3. Material obligatory part of, must be produced for redemption.....	201
4. May be paid in full on presentation of a part.....	203
5. Of disbursing officer.....	303
6. Of executive officer as to suit on.....	XXXIX
7. Official of, depositary.....	185
8. Of officer holding over.....	115
9. Sometimes paid twice.....	18
<i>Bonds—</i>	
1. And interest checks, transfer and control of.....	179
2. Appropriation for redemption of.....	200

	Page.
<i>Bonds—Continued.</i>	
3. As a trust fund.....	198
4. Assignment of.....	23, 35
5. As to.....	242, 255, 286
6. As to control of.....	190
7. As to controverted questions of ownership.....	XXXIV
8. As to ownership of.....	192
9. As to rights of <i>cestuis que trust</i>	XXXIV
10. As to transfer of.....	XXXIV
11. Cancellation and destruction of.....	201
12. Claim for transfer of.....	190
13. Classes of, authorized by loan acts.....	204
14. Difference between registered and coupon.....	288
15. Issued and inscribed with the assent of the husband in the name of his wife.....	171
16. Legal origin of.....	201
17. Marriage contract, as to disposition of.....	170
18. Negotiability of.....	132
19. Of the United States, coupon or registered.....	257
20. Of wife claimed by husband.....	170
21. Payment of, after maturity.....	194
22. Registered in name of deceased executor, disposition of.....	190
23. Reissue of.....	202
24. Sale of.....	194
25. Statutes authorizing issue of Government.....	201
<i>Bonds of Indemnity—</i>	
1. As to drafts.....	241
<i>Boutwell, George S.—</i>	
1. Instructions of, as Secretary of the Treasury, regarding sale of old material.....	48
<i>Bowdish, Kate R.—</i>	
1. Party in false description case.....	266
<i>Branch—</i>	
1. Of the public service.....	355
2. Of the public service, as to construction of expression.....	360
3. Of the public service, what is and what is not.....	359
<i>Branches—</i>	
1. Of executive power, as to.....	360
2. Of the Government, as to interference with the executive department..	XVI
<i>Breach—</i>	
1. Of subcontract for carrying mails.....	10
<i>Bribery—</i>	
1. As to.....	24
<i>Brief—</i>	
1. Of William Lawrence, copy of, referred to, as to sale of Indian lands...	370
<i>Briefs—</i>	
1. Written or printed.....	XXVIII
<i>Brokers—</i>	
1. Clerks borrowing money of.....	17
2. Taking orders for pay from clerks.....	17
<i>Brown, Joseph E.—</i>	
1. Governor, proclamation of.....	343
<i>Buildings, Public—(See Public Buildings.)</i>	
<i>Bundy's Case—</i>	
1. Re-examined.....	260

	Page.
<i>Bureau of Accounts—</i>	
1. In Department of State.....	349
<i>Bureau of Engraving and Printing—</i>	
1. Exchange of old printing-presses for new.....	53
<i>Bureaus—</i>	
1. As to work performed in the various.....	XX
2. In Department of State.....	349
3. In Treasury, as to.....	247
<i>Burial—</i>	
1. Of late President Garfield.....	372
<i>Bush, W. S.—</i>	
1. Attorney in Dorsey's appeal case.....	
<i>Butler, General B. F.—</i>	
1. Authority given to, by Secretary of War.....	85
<i>By-Laws—</i>	
1. Of corporations, as to indorsements.....	190
C.	
<i>Called Bonds—(See Bonds.)</i>	
1. As to payment of.....	XXVII
<i>Call for Payment—</i>	
1. Of United States bonds.....	200
<i>Camp, Hon. E. C.—</i>	
1. Attorney in Evans's case.....	112
<i>Candidates—</i>	
1. As to contest for place of Representative in Congress.....	322
<i>Canon—</i>	
1. Of public policy, as to contracts.....	15
<i>Capacity—</i>	
1. As to distilleries.....	318
2. Of wife as to disposition of securities.....	175
<i>Caption—</i>	
1. False description in, of schedule of claims.....	267
<i>Cases—</i>	
1. Adjudicated by courts unsatisfactory, except as they rest on principle..	113
2. Table of.....	VII
<i>Cases and Subjects—</i>	
1. Table of, in their respective order.....	XI
<i>Cashier—</i>	
1. Of bank, as to indorsements.....	189
2. Of bank, power to delegate duties of.....	62
<i>Cash payments—</i>	
1. Of claims.....	297
<i>Celebrate—</i>	
1. Derivation of.....	143
<i>Celebration—</i>	
1. Meaning of.....	143
<i>Census—</i>	
1. Appropriation for Tenth.....	33
<i>Centennial Anniversary—</i>	
1. Of the battle of Yorktown, date of.....	142
<i>Centennial International Exhibition—</i>	
1. As to celebration of.....	144

	Page.
<i>Certificate—</i>	
1. As to correction of, before final payment	XXXII
2. As to indorsement of draft	190
3. Given to master of vessel regarding destitute seamen	26
4. Of acknowledgment of assignment	204
5. Of Clerk of House	323
6. Of election to Congress	322
7. Of Speaker of House	328
8. Second Comptroller's, effect of	267
9. To a printed blank, as to indorsement of registered bonds	286
<i>Certificate of Board of Audit—</i>	
1. As to illness and burial of late President Garfield	376
<i>Certificates—</i>	
1. Of judge not conclusive on accounting officers	155
2. Of service of clerks unappropriated for	33
3. On accounts, practice of Treasury Department as to	213
<i>Certification—</i>	
1. Of accounts	154
<i>Certified Balance—</i>	
1. Authority to recall settlement having a	XXXIII
2. Effect of, as evidence	XXXIX
<i>Certifying Balances—</i>	
1. Arising on accounts, as to	XXVI
<i>Cestui que Trust—(See Guardian.)</i>	
1. As to transfer of registered bonds	190
<i>Charges—</i>	
1. As to	339
2. Fees and emoluments, as to retention of, by district attorney	120
<i>Charter—</i>	
1. Of a corporation	14, 31
<i>Check—</i>	
1. As a negotiable instrument	34
2. Effect of issuance on, upon warrant	XXXIII
3. If lost or destroyed	32
4. Issued by disbursing officer	14
5. The, is not money	32
6. The, is not payment	32
7. Upon the Secretary of the Treasury, First Comptroller as a	XXI
<i>Checks—</i>	
1. Circular as to	187
2. Disbursing officers can draw, only in favor of person to whom payment is made	65
3. Indorsement of	14
4. Instructions relative to	87
5. Of disbursing officers	297
6. Payable to order	187
7. To be drawn on depositaries for disbursements	61
8. Usage of banks in paying	185
9. With indorsements in full	185
<i>Cherokee Indians—</i>	
1. As to removal of certain North Carolina	366
<i>Chief Clerk—</i>	
1. In office of First Comptroller had no administrative powers	61
2. In office of the Commissioner of Internal Revenue	249
3. Of Comptroller's office not the deputy of the Comptroller	61

	Page.
<i>Chief Clerk</i> —Continued.	
4. Office of, in First Comptroller's office abolished	61
5. Of House, as to	362
<i>Chief Clerks</i> —	
1. Of bureaus, duties of, performed by deputies	61
<i>Chief Justice</i> —	
1. Of Territory of New Mexico, letter of, to Attorney-General Brewster referred to	149
<i>Chief of Bureau</i> —	
1. Assistant or deputy of, may perform duties of	283
<i>Chief Supervisors</i> —	
1. Of elections, accounts of, certified by judge of court	153
<i>Cholera</i> —	
1. Prevention of spread of	223
<i>Chose in Action</i> —	
1. Situs of a	233
<i>Choses in Action</i> —	
1. Right of husband to wife's	174
2. Title to	271
<i>Cigars</i> —	
1. And other articles	252
<i>Circuit Court</i> —	
1. As to power of, to command withdrawal of money from the Treasury ...	XL
<i>Circuit Court Commissioners</i> —	
1. As to criminal jurisdiction of	89
<i>Circular</i> —(See <i>Regulation</i> .)	
<i>Circular</i> —	
1. As to checks, disbursing officers and depositaries	187
2. Concerning assessments as to distilling, copy of	396
3. Concerning rewards to informers, copy	244
4. Information as to health supplies	397
5. Instructions to disbursing officers	86
6. July 31, 1873, as to informers	207
7. Of April 6, 1881, as to indorsements, copy of	189
8. Of Attorney-General, as to warrants	92
9. Of Secretary of the Treasury, as to taxes	275
10. Of Sixth Auditor, regarding pay drafts	123
11. Regulations of the Treasurer as to redemption of the currency quoted from	167
12. To claimants for services and expenses, as to illness and burial of late President Garfield	372
<i>Citizenship</i> —	
1. National and State	237
2. Of native wife of alien husband	173
<i>Civil Action</i> —	
1. As to judicial proceedings against accounting officers	XXXVI
<i>Civil Liability</i> —	
1. In damages of officers for a malicious act	XXXVII
<i>Civilization Fund</i> —	
1. As net proceeds of sales of lands	367
2. As to	365
3. Disposition of	372
4. Indian tribes	371
<i>Civil Jurisdiction</i> —	
1. As to circuit court commissioners	89

	Page
<i>Civil Officer—</i>	
1. As to	247
2. Judge Story's remarks upon meaning of expression.....	355
<i>Civil Rights—</i>	
1. As to	342
<i>Civil War—</i>	
1. As to	336
2. Invitation to abandon.....	335
<i>Claim—(See Interest.)</i>	
1. Against Government as a chose in action	233
2. Against the United States, assignment of.....	127
3. Against United States, effect of local laws on.....	237
4. Assignment before allowance of, is void	29
5. As to colonization.....	340
6. As to conclusiveness of allowance for.....	13
7. As to decree of court requiring an assignment of.....	XL
8. As to, made against any executive Department.....	XXXVIII
9. As to revocation of allowance of.....	XXXII
10. As to rival claimants demanding payment of the same.....	XXXIX
11. As to successive steps taken in prosecuting a.....	XXVIII
12. As used in statutes.....	23
13. By widow for salary of deceased contestant.....	325
14. Construed as including liquidated demands.....	13
15. Designed to apply to every money demand.....	19
16. Disallowed in exigency case.....	111
17. Exceptions regarding assignment of.....	36
18. Final action, as to authorizing payment.....	XXVIII
19. Final adjustment of.....	XXXI
20. For advertising	309
21. For commissions as disbursing agent.....	157
22. For fines, penalties, and forfeitures.....	4
23. For refund of deficiency tax.....	315
24. For transfer of bonds.....	190
25. In Court of Claims as to seizures.....	XXXVIII
26. In favor of Sanborn, reported to Speaker of House.....	213
27. In the statute, as to the word.....	13
28. Is not negotiable at common law.....	13
29. Meaning of.....	19
30. Milton quoted from regarding.....	20
31. Of citizen of United States against foreign Government.....	395
32. Of former holder of bond, how defeated.....	204
33. Of husband to United States bonds of wife.....	170
34. Of Samuel P. Evans for compensation.....	113
35. Over person held to service or labor.....	20
36. Payment of, demanded by an executor, as to.....	XLI
37. Payment of, to agent acting under power of attorney.....	14
38. Payment of, to financial officer of corporation.....	14
39. Payment of, to wrong claimant.....	XXXIX
40. Presented by substituted attorney	313
41. Prosecution and recovery of	236
42. Recovery of, in District of Columbia	181, 236
43. Supreme Court, definition	20
44. To compensation under Sanborn contract	209
45. To compensation, valid, cannot be created by party who acts for Gov- ernment without authority of law	111
46. Transfer before allowance of, is void	20

Page.

Claim—(See interest)—Continued.

47. Warrant for payment of, by Secretary of Treasury.....	16
48. Webster's definition of.....	19
49. When disallowed.....	156
50. Where amount in controversy exceeds three thousand dollars.....	XXXVIII
51. Where decision will affect a class of cases.....	XXXVIII
52. Where decision will furnish a precedent for future action.....	XXXVIII

Claim Agents—

1. Act prohibiting, from becoming.....	439
--	-----

Claimant—

1. As to reference to Court of Claims.....	XXXVIII
2. Consent or denial of, as to set-off.....	209
3. Court may give relief to rightful.....	XXXIX
4. Deceased, as to Treasury drafts.....	231
5. Judicial remedy for.....	XXXVII
6. Payment after death of.....	24
7. Payment of claim to wrong.....	XXXIX
8. Payment to, of annual income tax.....	279
9. Refusal to surrender draft to.....	241
10. Relation between attorney and.....	314
11. Right of, to revoke authority of his attorney.....	313
12. Right to set-off moneys legally due a.....	205
13. To a seat, as to <i>de jure</i>	327
14. When denying his indebtedness as to set-offs.....	XXIX

Claimants—

1. Against the United States, writ of mandamus by.....	XXXVI
2. Assignment of claims against the Government by.....	XX
3. Regulations in Departments as to.....	XXVII
4. Rights of.....	XXVII
5. Table of.....	IX

Claims-Assignment Case..... 13**Claims—**

1. Action of accounting officers of Treasury Department as to.....	XXXV
2. Adjustment of, and exercise of executive and not of judicial power.....	XXXIX
3. Against District of Columbia.....	13, 28
4. Against Government, Lawrence's law of.....	343
5. Against the Government, as to.....	XXIII
6. Against United States, as to.....	213
7. Against United States, payment of.....	13
8. Allowance of.....	XXXIX
9. Allowed by Congress.....	19
10. Allowed by Fourth Auditor.....	266
11. Allowed by Third Auditor.....	266
12. Approval of.....	148
13. Assignment of.....	15
14. Assignment of, against the United States, as to.....	XLII
15. Assignment of salary not yet due.....	395
16. Assignment of, should not be recognized.....	18
17. Assignment of, when void.....	15
18. Assignments, transfers of.....	13, 348
19. As to assignment of.....	XX
20. As to controverted questions of ownership.....	XXXIV
21. As to determination of conflicting rights of parties.....	XXXVII
22. As to evidence to enable accounting officers to pass upon.....	XXXIV

Claims—Continued.

23. As to examination of	XXXIX
24. As to foreign guardians.....	171
25. As to injunction	XXXVI
26. As to judicial interference with action of accounting officers.....	XXXIV
27. As to jurisdiction of accounting officers over.....	XXII
28. As to mandamus	XXXVI
29. As to number of, disposed of each year.....	XXXIII
30. As to payment of.....	XXXIX
31. As to receiving and examining.....	XXVI
32. As to reference of, to Court of Claims	XXXV
33. As to satisfaction of, disputed or controverted	XL
34. Auditing and payment of	29
35. Balances of, certified by Comptroller.....	16
36. Collected under powers of attorney.....	13
37. Committee of, in Congress	21
38. Comprehensive meaning of.....	13
39. Constructions of, meaning of	20
40. Control of Secretary of the Treasury over	XXXVIII
41. Disallowance of.....	162
42. Due to the United States, as to.....	XXIX
43. Effect of allowance of	XXV
44. For horses and other property	265
45. For proceeds of captured or abandoned property.....	XXXVIII
46. For salary and pay due Army officers.....	13
47. For trial and adjudication	XXXVIII
48. For unliquidated damages	1
49. Founded upon law of Congress.....	XXXVII
50. Founded upon regulations of Executive Departments.....	XXXVII
51. Growing out of the illness and burial of late President Garfield	372
52. Include all liquidated and unliquidated demands	19
53. Included in assignments by operation of law	13
54. Included in assignments under act May 8, 1792	13
55. Included in assignments under act of June 30, 1864	13
56. Included in assignments under special statutes	13
57. Included in voluntary assignments.....	13
58. Including salaries are not assignable, usually	23
59. Lien upon	XXXVII
60. Manner and order of prosecuting	XXVIII
61. Mode of proceeding to secure payment of	16
62. No assignment of salaries can generally be made.....	24
63. No law for assignment of	13
64. Officers or tribunals authorized to act on	XXVI
65. Of informers	207
66. On which drafts have been issued	232
67. Paid by disbursing officers	XXVII
68. Payment of	190, 220, 265, 297
69. Payment of, to financial officer of corporation	14
70. Pending, for consideration of accounting officers, as to.....	XXXVII
71. Power of Congress to examine	279
72. Prohibition of assignment of.....	125
73. Prosecuting	19
74. Purchasers of	33
75. Questions arising in relation to	XX
76. Reported to Congress for consideration.....	22

	Page.
<i>Claims—Continued.</i>	
77. Statutory power to examine allow or pay	XXXIX
78. Upon the United States.....	19
79. Voluntary payment of, to foreign guardian.....	181
80. Warrant for payment of, countersigned by First Comptroller.....	16
81. Which are to be examined by auditing officers	16
<i>Claims Commissions—</i>	
1. Between this and other nations	23
<i>Claims Filed—</i>	
1. Growing out of illness and burial of late President Garfield	379
<i>Claims for Damages—</i>	
1. Jurisdiction of Court of Claims as to	XXIX
<i>Class of Cases—</i>	
1. Claim where decision will affect a	XXXVIII
<i>Classes—</i>	
1. Of public contracts.....	102
<i>Classes of Questions—</i>	
1. Which come before the First Comptroller	XVIII
<i>Clause—</i>	
1. An act providing general legislation, effect of.....	347
2. In a subcontract for carrying mails.....	1
3. Of contract, a void.....	7
<i>Clauses—</i>	
1. Of statutes, as to construction.....	277
<i>Clerical Errors—</i>	
1. Effect of, in statutes.....	282
<i>Clerk—(See Agent.)</i>	
1. As a general or special agent or inspector.....	247
2. Definition of, by Bouvier.....	248
3. To superintendent of public schools.....	305
<i>Clerk-hire—</i>	
1. As to.....	299
<i>Clerk of Court—</i>	
1. Compensation of.....	153
<i>Clerk of House—</i>	
1. As to advertising.....	309
2. As to roll of membership.....	323
<i>Clerks—</i>	
1. Appointment of, to investigate.....	241
2. Authority of Secretary of the Treasury as to.....	220
3. Borrowing money from brokers.....	17
4. Detail of, for duty away from Washington.....	242
5. Distribution of, among the various bureaus in the Treasury Department.	251
6. In Departments at Washington, service of.....	247
7. In service of Census unappropriated for.....	33
8. Regulations for the conduct of.....	251
<i>Clerks' Investigation Case</i>	241
<i>Clerkships—</i>	
1. Change in grade and compensation of.....	215
<i>Clerks' Salary—</i>	
1. Substitute to receive part of.....	345
<i>Cobb, Howell—</i>	
1. Secretary of the Treasury, opinion by, as to permanent legislation.....	305
<i>Cockburn, Sir A.—</i>	
1. Quotation from, as to construction.....	XXV

	Page.
<i>Coin—</i>	
1. Redemption of currency in	165
<i>Colbath's Case</i>	280
<i>Colbath, S. H.—</i>	
1. Party in Colbath's case	280
<i>Collection—</i>	
1. As to provisions for, of abandoned property	xxxviii
2. Of duties and taxes	242
3. Of taxes	275
<i>Collection District—</i>	
1. Duties to be performed in	254
<i>Collections—</i>	
1. Made under power of attorney	13
<i>Collector of Customs—</i>	
1. As to construction of public buildings	155
<i>Collectors—</i>	
1. Districts assigned to	155
<i>Collectors of Customs—</i>	
1. As disbursing agents	155
2. Required to disburse moneys for the construction of public buildings...	159
<i>Collectors' Offices—</i>	
1. Examinations of	252
<i>Collectors of Internal Revenue—</i>	
1. Districts assigned to	155
2. Investigation of office of	241
<i>Collins, B. H.—</i>	
1. Party in clerk's investigation case	245
<i>Colonization—</i>	
1. Of people of African descent	322
<i>Color of Right—(See Right.)</i>	
<i>Combs Leslie—</i>	
1. Party in Gibson's case	294
<i>Commentaries—</i>	
1. As to	xxiii
<i>Commercial Usage—</i>	
1. As to indorsements	191
<i>Commissary of Subsistence—</i>	
1. As to claim of	xxxvii
<i>Commissary Stores—</i>	
1. Sales of	55
<i>Commissioner of Customs—</i>	
1. As to appellate jurisdiction exercised by	xxvi
2. As to payment of claims	302
<i>Commissioner of General Land Office—</i>	
1. Demands settled	xx
2. Duties of, as to claims and accounts	xxvi
3. Letter of, as to sales of land	365
<i>Commissioner of Indian Affairs—</i>	
1. Consent of, as to assignments of contracts with Indians	15
<i>Commissioners' Per Diem Case</i>	262
<i>Commission—</i>	
1. As to a right to a seat in Congress	226
2. International prison	354
3. Of Major Burt, expiration of	116

	Page.
<i>Commissions—</i>	
1. Allowed to postmaster for construction of public buildings.....	155
2. As disbursing agent, claim for.....	157
3. As to.....	339
4. Of H. S. Huidekoper not allowed.....	156
<i>Commissioner—</i>	
1. As to school farms.....	340
<i>Commissioner of Deeds—</i>	
1. As to acknowledgments.....	190
<i>Commissioner of Internal Revenue—</i>	
1. Allowance by refunding claim.....	129
2. As to.....	242
3. As to transfer and suspension.....	253
4. Authority of, as to appointment of investigators.....	242
5. Authority of, to revoke allowance of claims made by.....	xxxii
6. Decision of, as to Malakof Bitters.....	129
7. Discretionary power of.....	135
8. Fees prescribed by.....	252
9. Finding of.....	134
10. Judgment of, conclusive regarding questions of fact.....	131
11. Letter of, in Sanborn's case.....	207
12. Powers of, cannot be delegated.....	82
13. Reports of, as to direct tax acts.....	334
14. Schedule of refund claims submitted by.....	276
<i>Commissioner of Patents—</i>	
1. Decision of, conclusive.....	77
<i>Commissioners—(See Agents.)</i>	
1. Of circuit courts, accounts of.....	154
2. Of District of Columbia, as to disbursements by.....	xix
3. Of District of Columbia, as to lotteries.....	260
4. Of District of Columbia in relation to making contracts.....	198
5. District of Columbia, settlement of accounts of.....	309
6. To make investigations, authority to appoint.....	248
7. Warrants issued by.....	89
8. Who may be appointed.....	92
<i>Committee—(See Lunatics, Foreign Guardians).</i>	
1. Authority of.....	144
2. Authorized to select site for monument at Yorktown.....	141
3. To select site for monument provided for.....	142
<i>Committee on Arrangements—</i>	
1. Provision for.....	143
<i>Common Council—</i>	
1. Authority of.....	109
<i>Common Law—</i>	
1. In force unless repealed by statute.....	32
2. Of Executive Departments.....	171
3. Principles of, considered as to payment of claims.....	16
4. Principles stated.....	191
<i>Common-Law Rule—</i>	
1. Application of, as to disposition of Government bonds.....	176
2. As to interest checks.....	176
3. As to letters of administration.....	231
4. Regarding assignment of negotiable securities by a married woman....	176
<i>Common Property—</i>	
1. Of husband and wife invested in bonds in favor of wife.....	171

	Page.
<i>Common Sense—</i>	
1. Should prevail in construction	2-3
<i>Compound Liquor—</i>	
1. Liability of, as to stamp tax.....	129
<i>Comprehending Words—</i>	
1. Considered as	151
<i>Compensation—</i>	
1. And fees prescribed by statute, not payable to United States marshal, holding over	111
2. As to additional.....	254
3. As to assignment of.....	xx
4. <i>De facto</i> officers not entitled to.....	327
5. Due a contractor, assignment of	122
6. For making disbursements.....	157
7. For past services, assignment of	34
8. For preparing Digest	362
9. For publishing proposals for carrying mails	309
10. For publishing proposals to be prescribed by Postmaster-General.....	309
11. Of clerk of court.....	153
12. Of informers.....	205
13. Of inspectors	251
14. Of Members, monthly payment of	323
15. Of postmasters of the fourth class, as to	xxi
16. Of Reporter of Supreme Court	300
17. Of Senators and Representatives, as to.....	xxi
18. Of special agents	251
19. Per diem changed to annual	215
20. Powers of attorney and assignments to receive.....	33
21. Prescribed for serving venires and summoning jurors	164
<i>Compensations—</i>	
1. For two positions	305
2. Of postmasters, as to	xxi
<i>Comptroller—</i>	
1. Action of, open to inquiry in suit on bond.....	xxxix
2. As to certifying balance due a claimant	xxxii
3. As to considerations of questions submitted to.....	xlii
4. Balances of claims certified by	16
5. Conclusive effect of judgment of, charging a liability	xxxii
6. Decision of, not subject to be changed or modified.....	xvii
7. Decision of, only determines matters actually passed upon.....	xxiv
8. Execution of judgment of, as to.....	xxxii
9. Finality of judgment of.....	xxxi
10. General approval of, jurisdiction exercised by	xvii
11. Mandamus will not lie against.....	78
12. Sixth Auditor is also a.....	12
13. To judge of questions of law and fact	81
<i>Comptroller's Case.....</i>	283
<i>Comptrollers—</i>	
1. As to appellate jurisdiction exercised by.....	xxvi
2. Certifying claims	20
3. Effect of decisions of.....	xvi
4. Regarding accounts of disbursing officers.....	2-
5. To decide what are legal vouchers.....	xxx
<i>Comptrollers' Decisions—</i>	
1. Conclusiveness of, upon the executive branch of the Government.....	xxvii

	Page.
<i>Conclusiveness—</i>	
1. As to the common-law principle of	xxx
<i>Conclusion—</i>	
1. Of rights of parties	181
<i>Condemned Clothing—</i>	
1. Sales of	55
<i>Condemned Stores—</i>	
1. And other army supplies, sale of	36
<i>Condition Precedent—</i>	
1. As to notice of subcontractor for carrying mails	9
2. To assignment of bonds	290
<i>Conditions Precedent—</i>	
1. Of act, effect of unreasonable delay in accepting	331
2. Prescribed by section 12, act June 7, 1862	331
<i>Condition Subsequent—</i>	
1. As to notice of subcontractor for carrying mails	10
<i>Conflict—</i>	
1. Apparent, between sections 255 and 3657, Revised Statutes	160
<i>Conflict of Laws—</i>	
1. Regarding marriage and rights under	175
<i>Conflicting Decisions—</i>	
1. As to	XLII
<i>Conflicting Descriptions—</i>	
1. In an appropriation act	220
<i>Congress—(See Constitutional Law, Crowley's Case in index.)</i>	
1. Action of, as to payment to assignees	33
2. Allowance by, of salary to widow of deceased officer	270
3. As to membership	323
4. As to <i>prima facie</i> right to a seat in	326
5. As to the acts of	XXIII
6. Authority given by, to Legislature of New Mexico	150
7. Authority of, over District of Columbia	238
8. Authority of, over Territories	152
9. Control of, as to payments by the Treasury Department	XVII
10. Decisions of	279
11. Intention of, in making amendments	219
12. Joint resolution of, as to reconstruction	344
13. Power of, as to claims	279
14. Power of, over salary due deceased public officer	270
15. Prohibitory power of	148
16. When intending allowance or statement of a claim to be conclusive, should use explicit language	13
<i>Congressmen—</i>	
1. Becoming claim agents, act prohibiting	439
2. Constitutional prohibitions relating to	434
<i>Consent—</i>	
1. Of husband, when required, for wife's transfer of securities	170
2. Of parties, as to application of a particular local law	177
3. Of Postmaster-General to transfers or sublettings of contracts for carry- ing mails	6
<i>Consequences—</i>	
1. Construction that would lead to absurd	331
<i>Consideration—</i>	
1. Equitable interests as to transfer of, for a sufficient	203

	Page.
<i>Consols—</i>	
1. Of 1907, disposition of	191
<i>Constitution—</i>	
1. Article I, sec. 6, Congressmen, office	436
2. Article II, section 2, referred to.....	113, 115, 358
3. Article II, section 2, clause 2, President, nominations	446
4. Article IV, section 3, clause 2, claims.....	20
5. Article VI, section 3, referred to	346
6. Assignment of powers by	360
7. As to construction of	XXIII
8. As to defeat of.....	114
9. As to oath of office.....	346
10. As to the.....	XXIII
11. Clause 2, section 3, person held to service or labor, claim for.....	20
12. Construction of, regarding claims	20
13. Departments of the Government created by.....	XXIII
14. Executive construction of	XXIII
15. Gives conduct of Government to distinct branches	233
16. Power given by, to Congress, as to salaries	270
17. Powers of the President	230
18. Protects salary of President and judges of courts	119
19. Provisions of, as to who is an officer.....	358
<i>Constitutional Amendments—</i>	
1. Adoption of	342
<i>Constitutional Law—</i>	
1. The Constitution, Article I, section 6, does not prohibit a person who is professionally retained under sections 363 and 366 of the Revised Statutes from being a member of Congress, because such retainer is not an office. (See 14 Opinions, 409, Williams, Attorney-General, July 3, 1874)	355
<i>Construction—</i>	
1. As to exceptions.....	368
2. As to interpretations	368
3. As to modification.....	368
4. As to provisos	368
5. As to repeals	368
6. Contemporaneous, as to what is law	355
7. Given to act of June 27, 1864	119
8. Given to act of June 23, 1874	119
9. Given to section 49, Revised Statutes.....	328
10. Given to statutes regarding assignments by public officers of future salary.....	34
11. Of act of 1874	122
12. Of appropriation acts, as to.....	xx
13. Of appropriation acts, general rule for	306
14. Of a statute.....	6
15. Of deeds and wills.....	268
16. Of one clause aided by language of another	365
17. Of particular provisions.....	298
18. Of Revised Statutes. The professional retainer of a member of Congress, under section 366; and 366 is not a contract within the meaning of sections 3739-3742.....	355
19. Of section 4, appropriation act, August 5, 1882.....	214
20. Of sections 355, 3657, and 3658, Revised Statutes.....	160, 162
21. Of statutes.....	268, 296
22. Of statutes as to false description	265

	Page.
<i>Construction—Continued.</i>	
23. Of statute regarding salary	19
24. Of statute, right of judges in deciding.....	324
25. Of statutes, rule in	228
26. Principle of, where two statutes relate to the same thing.....	51
27. Questions relating to	XVIII
28. Rule of	42
29. Rule of, as to special words.....	246
30. Rule of, as to several sections	250
31. Well founded doubts should be resolved in favor of claimant	164
<i>Consuls—</i>	
1. Authority and responsibility of.....	140
<i>Consular Accounts case.....</i>	349
<i>Consular Accounts—</i>	
1. Adjustment of	138
<i>Consular and Diplomatic service—</i>	
1. As to	25
<i>Consular Regulations—</i>	
1. As to allowances	271
2. As to consular accounts	351
3. Prescribed by President	26
4. Quoted as to granting relief	139
<i>Consul-General—(See Minister.)</i>	
<i>Contagious and Infectious Diseases—</i>	
1. Prevention of introduction of	227
<i>Contemporaneous Construction—</i>	
1. As to appropriations	331
<i>Contents—</i>	
1. Table of	III
<i>Contestants—</i>	
1. Salary of successful	329
<i>Contestant's Widow's case</i>	328
<i>Contest—</i>	
1. As to the members of Congress	321
<i>Contestee—</i>	
1. Effect of death of	321
<i>Contests—</i>	
1. Over validity of assignments	17
<i>Contact—</i>	
1. As to meaning of words	355
<i>Contingencies—</i>	
1. Payment of money on happening of certain	331
<i>Contingent Expenses—</i>	
1. As to appropriation for	299
2. As to foreign ministers	271
3. Of consulates	354
4. Of diplomatic and consular service	26
<i>Continuance—</i>	
1. Of the hearing of a criminal charge	268
<i>Controverted Titles—</i>	
1. As to questions involving.....	XVIII
<i>Contract—</i>	
1. As to new	4
2. Attempt to ratify an unauthorized.	108
3. Attorney-General Bates quoted as to a	101

	Page.
<i>Contract—Continued.</i>	
4. Between Secretary of the Treasury and John D. Sanborn	206
5. By an executive officer, authority for making	205
6. Clause of, may be severable	1
7. Correcting terms of	92
8. Effect of assignment of	104
9. Expressed or implied, as to	xxxvii
10. Express or implied, must be made for goods furnished, before the Government becomes liable	106
11. For carrying mails may be sublet on transferred	15
12. For engravings	92
13. For publishing proposals for carrying the mails	309
14. For supplies for public service	100
15. Laws and incidents relating to marriage	178
16. Legality of, when made prior to availability of appropriation	100
17. Limitation of power to make	99
18. Made by executive officer without authority is void	209
19. May be valid in favor of party not in fault, when one party to it violates a statutory prohibition	110
20. Of bailment	185
21. Of depositary	185
22. Of Government as to bonds	193
23. Of John W. Dorsey for carrying mails	1
24. Of Messrs. A. Hoen & Co	94
25. Original, for printed matter not ratified by receipt of Public Printer	107
26. Provisions of	1
27. Statute prohibits and makes void assignment of	6
28. To furnish supplies to the Government	104
29. Transfer of	6
30. Valid provisions of, may be enforced	1
31. Void clause of	1
32. When rendered void	110
33. When transferred is by statute annulled	6
34. With Sanborn void	207
<i>Contractor—</i>	
1. Ascertaining amount due original	4
2. For carrying mails may sublet or transfer contract	15
3. Insolvency of	9
4. Liabilities of original	4
5. Liability of	12
6. Notice given to, by subcontractor for carrying mails	1
7. Withholding stipulated penalty for benefit of	1
<i>Contractors—</i>	
1. As to services rendered	346
2. For carrying the mails, as to	xxi
3. Pay drafts of	123
4. Power of Sixth Auditor to determine amount due	4
<i>Contracts—</i>	
1. As to	285
2. As to rescinding	102
3. Between Government and informers	205
4. Classes of public	102
5. Denying validity of unauthorized	93
6. Discussion as to	103
7. Effects of delay in making	93

	Page.
<i>Contracts—Continued.</i>	
8. Enforcement of executory	93
9. Exceptions in	29
10. For carrying mails	1
11. For moieties were inoperative after June 6, 1872	213
12. For services.....	345
13. For supplies.....	199
14. For supplies for District of Columbia	198
15. For supplies made prior to passage of act authorizing.....	198
16. Government discharging obligations under.....	33
17. Made prior to appropriation act, validity of.....	199
18. Making of, in anticipation of an appropriation.....	99
19. Opinion of Attorney-General Devens as to.....	102
20. Opinion of Solicitor-General Phillips as to.....	102
21. Public, legal requirements for.....	97
22. Questions arising as to validity of	102
23. Right to rescind executory	101
24. Rule in offers to make.....	338
25. Specific performance of.....	288
26. United States not liable for, till appropriation is available.....	100
27. When deemed void.....	102
28. Which exceed the amount appropriated for.....	100
29. With Indians.....	15
<i>Controverted Question of Law—(See Questions of Law.)</i>	
<i>Copies.—</i>	
1. Of subcontracts for carrying mails filed in office of Second Assistant Post-master-General	7
<i>Copy—</i>	
1. Of joint resolution as to publication of First Comptroller's decisions....	v
<i>Copyist—</i>	
1. As to.....	247
2. Substitute for.....	345
<i>Cornwallis, Earl—</i>	
1. Surrender of.....	141
<i>Corporation—</i>	
1. Assignment made by	204
2. As to charging of, by Comptroller, with a liability.....	xxxii
3. Difference between financial officer of, and agent of.....	31
4. Power of attorney of	14
5. Regarding charter of	31
<i>Corporations—</i>	
1. As to indorsements	190
2. Financial officer of	31
3. Power of attorney of.....	30
4. Subject to operation of section 3477, Revised Statutes	14
5. Who may receive payment in favor of	30
<i>Correspondence—</i>	
1. Between Treasury and State Departments as to consular accounts.....	349
2. Of Treasury Department, as to.....	xv
<i>Corruption—</i>	
1. As to official.....	xxxvii
<i>Costs—</i>	
1. As to	339
<i>Counterfeiting—</i>	
1. Appropriation for suppressing.....	219

	Page.
<i>Counsellors—</i>	
1. As to	XXVII
<i>Coun.ersign—</i>	
1. Warrants, as to authority of First Comptroller to	XX
<i>Counter-signature—</i>	
1. No money can be paid without First Comptroller's	XXI
<i>Countersigning—</i>	
1. Of warrants	77
<i>County Bonds—</i>	
1. Issued without authority	108
<i>County Courts—</i>	
Expenses of.....,	153
<i>Coupon Bond—</i>	
1. Description of	204
<i>Coupons—</i>	
1. Assignment of	35
<i>Coupon Bonds—</i>	
1. And coupons are negotiable by delivery.....	5
<i>Court—</i>	
1. Authority of, as to action of marshal	114
2. Cannot interfere after draft is issued	XXXIX
3. Decree of, will operate, after payment of draft, to determine the right to the fund.....	XXXIX
4. Force of order of.....	232
5. Is a branch of the public service.....	361
6. May give relief to rightful claimant	XXXIX
7. Number of terms of, in Montana in each year	150
8. Proceedings in, to determine rights of claimant.....	XXXIV
9. Terms of, in Utah Territory specified.....	150
<i>Court-Houses—</i>	
1. Construction of.....	155
<i>Court of Claims—</i>	
1. Allowance by commissioner evidence of right of action in	134
2. Allowance of claim by executive officer gives right of action in.....	XXV
3. As to action and judgment of.....	XXIV
4. As to findings and opinions of.....	XXIV
5. As to jurisdiction of.....	XXXVII
6. As to recognizing assignments	13
7. As to documents transmitted to.....	XXXVIII
8. As to seizures	XXXVIII
9. As to transmission of claim and papers connected therewith to	XXXV
10. Decisions of, as to	XV
11. Judgments in	28
12. Jurisdiction of, as to action by accounting officers	78
13. Jurisdiction of, as to claims for damages.....	XXIX
14. Jurisdiction of, as to counterclaims	XXIX
15. Jurisdiction of, as to set-offs.....	XXIX
16. Jurisdiction of, regarding claims	21
17. Regarding assignments to	28
18. Report of findings and opinions to heads of Departments	XXXV
<i>Court of Equity—</i>	
1. Decree of, as to surrender of draft	241
<i>Courts—</i>	
1. Accounting officers settle principles of law which are recognized by	XLI
2. Action of accounting officers in some cases conclusive on	XLI

	Page.
<i>Courts—Continued.</i>	
3. As to appellate jurisdiction of.....	XXVI
4. As to control of, over the Treasury.....	XL
5. As to evidence procured through agency of.....	XXXIV
6. As to issue of patents for lands.....	XL
7. As to judgment and determination of, over official acts of accounting officers.....	XXI
8. As to location of.....	XXVI
9. As to number of.....	XXVI
10. As to original jurisdiction of.....	XXVI
11. As to revocation of orders and decrees by.....	XXXII
12. As to session and jurisdiction.....	XXVI
13. As to terms of.....	XXXII
14. As to vacation, modification, or annulment of judgments, decrees, or other orders of.....	XXXII
15. Common law and decisions of Executive Departments recognized in ...	181
16. Created in Territories are "United States courts"(?).....	149
17. Expenses of United States.....	152
18. Findings and opinions of, not conclusive on Executive Departments ...	xxxv
19. General power of, by Injunction.....	xxxvi
20. Injunctions in.....	146
21. Interference of, with executive officers as to claims.....	xxxix
22. Interference of, with payment of claim.....	xxvii
23. Interference with executive officers.....	XL
24. Judicial, error in.....	146
25. Jurisdiction of, invoked in aid of accounting officers.....	xxxiv
26. Of the United States.....	120
27. Of Utah, as to.....	150
28. Supreme and District, appropriations for.....	152
<i>Coverture—</i>	
1. Laws and rules regarding.....	175
<i>Custom-Houses—</i>	
1. Construction of.....	155
<i>Credentials—</i>	
1. In due form.....	321
2. Of members filed with Clerk of House.....	323
3. Payment to Representatives having the proper.....	321
4. Required by law, as to claim for salary.....	329
<i>Creditor—</i>	
1. Assets released by.....	12
2. Of Government by assignment.....	18
<i>Creditors—</i>	
1. Assignments for benefit of.....	13, 27
2. As to the application of claimant's money to satisfaction of their debts.....	xxxviii
3. Of the estate, prior rights of.....	273
4. Of the Government, as to deceased.....	238
5. Policy of favoring resident.....	236
6. Preference of as to administration.....	235
7. Rights of, as to disposition of registered bonds.....	191
<i>Credits—</i>	
1. As to.....	xxix
2. As to disposition of United States bonds.....	197
3. Or assets of estate of deceased person, disposition of.....	232
4. On vouchers for supplies.....	57

	Page.
<i>Crime—</i>	
1. Detection of.	260
<i>Crimes—</i>	
1. As to lotteries.....	262
<i>Criminal Charges—</i>	
1. As to commissioners	263
<i>Criminal Jurisdiction—</i>	
1. As to circuit court commissioners	29
<i>Criminal Law—</i>	
1. Sections 3739–3742 of the Revised Statutes are not violated by a member of Congress who is professionally retained as an attorney under section 363 of the Revised Statutes	355
2. As to liability of accounting officers.....	XXXVII
<i>Criminal Proceedings—</i>	
1. As to judicial proceedings against accounting officers	XXXVI
<i>Crowley's Case</i>	355
1. A person employed by the Attorney-General under sections 363 and 366 of the Revised Statutes to assist a district attorney is not an officer. Such employment is a professional retainer. See opinion Attorney-General Williams, June 6, 1874 (14 Op. Att. Gen., 406)	355
<i>Crowley, Richard—</i>	
1. Party in Crowley's case	355
<i>Curtail Service—</i>	
1. As to carrying mails.....	2
<i>Cushing, Caleb—</i>	
1. Opinions as to legal signature quoted.....	69
<i>Custom—</i>	
1. Cannot modify a statute.....	126
2. When obligatory	126
D.	
<i>Damages—</i>	
1. Arising from annulment of carrying mails	5
2. As to claims for	XXIX
3. As to claims for unliquidated	1
4. As to liquidated.....	1
5. For a malicious act as to.....	XXXVII
6. Liquidated or unliquidated, as to claims for.....	XXIX
7. Uncertain and unliquidated, arising for breach of subcontract for carrying mails.....	10
<i>Davis, C. H.—</i>	
1. Party in false description case	265
<i>Death—</i>	
1. As to vacations.....	346
<i>Debates—</i>	
1. In Congress, as to extra compensation to members.....	357
<i>De Bildt, C. N.—</i>	
1. Party in DeBildt's case.....	171
<i>De Bildt, Lilian Augusta Stuart—</i>	
1. Party in De Bildt's case	171
<i>De Bildt's Case</i>	170
<i>Debt—</i>	
1. Good discharge of	161
2. Is a liquidated demand	16
3. Meaning of.....	16
4. Payment of, to foreign administration at domicile of debtor.....	180
5. Recovery of, by administrator	182

	Page.
<i>Debtor—</i>	
1. Local policy, or preference as to.....	238
<i>Debtors—</i>	
1. As to.....	XXIX
<i>Debts—</i>	
1. Difference between those of the United States and a private citizen....	183
2. Due from, have no locality at seat of, Government.....	183
3. Due from the United States, as to locality of creditor.....	239
4. Government pays its, voluntarily.....	240
5. Remedies for collection of.....	235
6. United States, not affected by outside laws.....	237
<i>Decedent—</i>	
1. As to disposition of bonds of.....	197
2. Rights of widow in Garnet's case.....	271
<i>Decision—</i>	
1. By a Comptroller only determines matters actually passed upon.....	XXIV
2. By First Comptroller in Atherton & Co.'s case.....	317
3. By First Comptroller in Clerk's investigation case.....	245
4. By First Comptroller in De Bildt's case.....	173
5. By First Comptroller in Dorsey's appeal case.....	5
6. By First Comptroller in Durkee's case.....	164
7. By First Comptroller in Election supervisor's case.....	154
8. By First Comptroller in Exigency case.....	96
9. By First Comptroller in Garnet's case.....	272
10. By First Comptroller in Lake's case.....	310
11. By First Comptroller in Malakof Bitters case.....	131
12. By First Comptroller in Marshal's mileage case.....	89
13. By First Comptroller in Sanborn's case.....	208
14. By First Comptroller in Seaman-relief case.....	139
15. By First Comptroller in Utah district attorney's case.....	121
16. By First Comptroller in Walsh's case.....	126
17. By First Comptroller in Yorktown Centennial case.....	143
18. By Comptroller, not subject to be changed or modified.....	XVII
19. Made by one Department cannot be reversed by another.....	181, 182
20. Of a question of fact, as to.....	XXV
21. Of Commissioner of Patents conclusive.....	77
22. Of Commissioner of Patents, impeachment of.....	77
23. Of either Department generally conclusive on the others.....	181
24. Of First Comptroller conclusive.....	102
25. Of House as to occupancy of a seat in Congress.....	326
26. Of supervisors of election, as to.....	XXV
27. Of Supreme Court cited.....	84
<i>Decision in Stoll vs. Pepper—</i>	
1. Principle involved in.....	395
<i>Decisions—</i>	
1. By Comptrollers, effect of.....	XVI
2. By Comptrollers, law of <i>res adjudicata</i> applied to.....	XXIV
3. By Comptrollers, postal service affected by.....	XXI
4. By First Comptroller, as to appendixes in.....	XX
5. By First Comptroller, as to publication of.....	XLII
6. By First Comptroller, distribution of.....	V
7. By First Comptroller, for 1880 and 1881, second edition of.....	XV
8. By First Comptroller, general character of.....	XV
9. By First Comptroller, importance of.....	XV
10. By First Comptroller, necessity for printed.....	XVII

	Page.
<i>Decisions—Continued.</i>	
11. By First Comptroller, one volume each year to be printed	XV
12. By First Comptroller, publication of.....	XV
13. By First Comptroller, reasons justifying publication of.....	XXII
14. Final source for.....	XVII
15. In executive Departments, classes of questions requiring.....	XXVI
16. In printed form	XVII
17. Of Court of Claims, as to.....	XV
18. Of Post-Office Department, Sixth Auditor not subject to.....	4
19. Of Supreme Court as to individual rights.....	XLII
20. Of Supreme Court, as to printing and publishing the	299
21. Of Supreme Court, as to reporter of.....	296
22. Of the Treasury Department, synopsis of.....	283
<i>Declarations—</i>	
1. Made in statute as to assignment of claims.....	15
<i>Decoration Day—</i>	
1. How celebrated	144
<i>Decreased Service—</i>	
1. As to carrying mails.....	2
<i>Decree in Equity—</i>	
1. As to registered bonds	191
<i>Decree—</i>	
1. Certified copy of.....	136
2. Of court as to rival claimants.....	XXXIX
3. Of court as to requiring an assignment of claim	XL
4. Of court will operate, after payment of draft, to determine the right to the fund	XXXIX
5. On a creditor's bill	9
6. To determine rights of parties.....	283
7. To determine the rights of rival claimants, as to.....	XXXIV
<i>Decrees—</i>	
1. As to.....	XXXII
2. As to law of.....	XXX
<i>Deductions—</i>	
1. As to carrying mails.....	2
2. From pay of contractors.....	9
<i>Deed—</i>	
1. When signed by daughter.....	80
<i>Deeds—</i>	
1. As to blank assignments.....	203
<i>De facto Officer—</i>	
1. Acts of, are valid as affecting the public.....	111
<i>Deficiencies—</i>	
1. Appropriations to supply.....	301
<i>Deficiency—</i>	
1. Appropriation act for 1882, section 2, quoted.....	220
<i>Deficiency Appropriation—</i>	
1. As to illness and burial of late President Garfield.....	372
<i>Deficiency Tax—</i>	
1. Refunding to distillers a.....	315
<i>Definitions—</i>	
1. Of negotiability, effect of, as to registered bonds.....	290
<i>Defrees, John D.—</i>	
1. Public Printer, approval by, of Hoen & Co.'s contract.....	94

	Page.
Delegation—	
1. Of authority to render official services.....	347
2. Powers of, possessed by public officer.....	61
Delinquencies—	
1. Imposing fines upon contractors for.....	9
Delinquency—	
1. Official, as to substitutes.....	347
Delivery—	
1. As to post-offices.....	158
2. As to negotiable instruments.....	292
3. As to transfer of title.....	203
4. Of Supreme Court decisions.....	300
Demands—	
1. As to jurisdiction of accounting officer over.....	xvii
2. Estopped by payment.....	14
3. Payment of liquidated.....	13
4. Payment of unliquidated.....	13
5. Settled by the Commissioner of General Land Office.....	xx
Demonstration—	
1. As to False Description case.....	268
Department of State—	
1. Action of, not conclusive on accounting officers.....	349
Department of the Interior—(See Interior Department.)	
1. Practice in regard to sale of old material.....	56
Departments—	
1. As to officers or clerks in.....	361
2. As to questions decided in.....	xvi
3. As to the three great powers of Government.....	361
4. Jurisdiction of, in relation to set-offs.....	xxix
5. Legislative, executive, and judicial.....	181
6. Of the Government, legal science pertaining to the great.....	xxxiii
7. Practice of, as to construction of statutes.....	36
8. Practice of, as to set-offs.....	xxix
Depositories—	
1. Circular as to.....	187
2. Payment of pension checks by.....	185
Depositary—	
1. Money deposited in.....	33
2. Official bond of.....	185
3. Of public moneys, liability of.....	185
4. Requirements as to monthly statements.....	187
5. Responsibilities of, as to blank indorsements.....	188
Deposit—	
1. Of moneys by disbursing officers.....	33
Depositories—	
1. As to credit of disbursing officers.....	297
2. Why established.....	239
3. Rule as between banks and their.....	187
Depository Bank—	
1. In Washington, failure of.....	65
Deposits—	
1. Made by disbursing officers.....	60, 88
2. Made by pension agent.....	187

	Page.
<i>Deputation—</i>	
1. At common law, limitations of power of.....	79
2. Nature of	79
<i>Deputies—</i>	
1. Of heads of Bureaus to perform duties previously imposed on chief clerks.	61
2. Of marshals and sheriffs	75
3. Practice of appointing	80
<i>Deputy Commissioner of Internal Revenue—</i>	
1. Is a deputy of the Secretary of the Treasury	73
<i>Deputy Comptroller—</i>	
1. In case of absence or sickness of.....	283
2. Intention of Congress in creating office of	72
3. Powers that may be delegated to.....	73
<i>Deputy—</i>	
1. Construction of act March 3, 1875, concerning.....	61
2. Definition of	71
3. Duties that may be performed by	74
4. Enlargement and abridgment of power of.....	75
5. He that has an office of trust cannot make a.....	79
6. When, may sign his principal officer's name.....	80
<i>Deputy First Comptroller—</i>	
1. As to performance of duties of	285
2. Duties of, as to clerks.....	249
3. Office of, created by act of March 3, 1875.....	61
4. Powers and duties of.....	62
<i>Deputy Officers—</i>	
1. Provisions in statutes in relation to.....	72
<i>Designated Services—</i>	
1. Act February 26, 1853, prescribes fees for.....	120
<i>Designation—(See Assignment.)</i>	
<i>Descriptions—</i>	
1. Rejecting one of two.....	274
<i>Detail—</i>	
1. Of clerks	249
<i>Detection—</i>	
1. Of crime	262
<i>Detectives—(See Inspectors, Agents, &c.)</i>	
<i>Determination—</i>	
1. Of accounting officer as to jurisdiction of courts over	XXI
<i>Devastavit—</i>	
1. As to disposition of registered bonds.....	195
<i>Devens, Charles—</i>	
1. Attorney-General. Opinion of, regarding exchange of old printing-presses	53
<i>Digest of Rules—</i>	
1. As to extra pay for preparing	364
2. Of House of Representatives.....	362
<i>Diminished Reserved Lands—</i>	
1. As to.....	366
2. In Kansas, as to	370
<i>Diminished Service—</i>	
1. As to carrying mails.....	2
<i>Diplomatic—</i>	
1. And consular service.....	25
<i>Diplomatic Officers—</i>	
1. Expenses and accounts of.....	354

	Page.
<i>Direct Tax Act—</i>	
1. Effect of twelfth section of.....	331
2. June 7, 1862, as to effect of twelfth section of.....	XIII
<i>Direct Tax Acts—</i>	
1. Compared and considered as to appropriations.....	331
<i>Direct Tax Case.....</i>	331
<i>Direct Taxes—</i>	
1. Farms or plantations sold for collection of.....	335
2. In insurrectionary district, collection of.....	334
<i>Disallowances—</i>	
1. As to.....	XXIX
2. Made by accounting officers.....	47
<i>Disbursement—</i>	
1. For relief of American seamen.....	140
2. Of appropriations, as to mode of.....	302
3. Of public money, as to extra pay for.....	357
<i>Disbursements—</i>	
1. By Commissioners of the District of Columbia.....	XIX
2. By consular officers.....	349
3. Classes of persons making.....	297
4. For construction of public buildings.....	65
5. For District of Columbia.....	264
6. From the Treasury, questions as to.....	XVIII
7. Legality of, as to Board of Health.....	225
8. Made by Commissioners of District of Columbia.....	307
9. Made for charitable and other associations.....	33
10. Of money appropriated for construction of public buildings.....	155
<i>Disbursing Agent—</i>	
1. As to illness and burial of late President Garfield.....	377
2. Distinction between disbursing officer and.....	159
3. Of National Board of Health, letter of, as to appropriations.....	222
<i>Disbursing Agents—</i>	
1. Postmasters as.....	155
<i>Disbursing Clerk—</i>	
1. Is an officer.....	159
2. In Department of State.....	349
<i>Disbursing Clerks—</i>	
1. Recognizing orders for pay.....	17
<i>Disbursing Officer—</i>	
1. As to claim of.....	XXXVII
2. Authority of, as to disputed salaries.....	323
3. Cannot confer authority to sign checks or drafts.....	62
4. Deposit account of.....	187
5. Marshal of District of Columbia is a.....	261
6. Money advanced to.....	18
<i>Disbursing Officer—(See Pension Agents.)</i>	
<i>Disbursing Officers—</i>	
1. Accounts, how settled.....	28
2. Advances to.....	14
3. As to payment of salaries by.....	XXVII
4. Checks drawn by.....	33
5. Circular as to.....	187
6. Instructions to.....	87
7. Moneys advanced to.....	297
8. Not depositaries, forbidden from paying out public moneys.....	61

	Page.
<i>Disbursing Officers</i> —Continued.	
9. Payment of claims by.....	29
10. Pay-rolls or vouchers of.....	14
11. Power to delegate authority to sign drafts.....	60
12. Regulations of August 24, 1876, as to.....	189
13. Vouchers required of.....	xxx
<i>Discount</i> —	
1. Or interest on advancements for unappropriated salary.....	34
<i>Discretion</i> —	
1. Abuse of, example of.....	147
2. As to selection of agencies.....	228
3. Given to officers, restraints upon.....	147
4. Judicial, conferred by law.....	146
<i>Discretionary Authority</i> —	
1. Accounts of officers invested with.....	147
2. When given to an officer, effect of.....	146
<i>Discretionary Power</i> —	
1. When grossly abused may be reviewed.....	147
<i>Diseases</i> —	
1. Contagious and infectious.....	221
<i>Disputed Claims</i> —	
1. As to set-off.....	209
<i>Disputed Facts</i> —	
1. As to claims.....	xxxviii
<i>Distilleries</i> —	
1. Inspection of.....	252
<i>Distillers</i> —	
1. Refund of taxes assessed against.....	315
<i>Distillery</i> —	
1. As to capacity of.....	395
<i>Distributees</i> —	
1. As to disposition of bonds.....	195
<i>Distribution</i> —	
1. Effect of local laws over.....	238
2. Of First Comptroller's decisions.....	v
3. Of laws of the United States.....	v
4. Of Revised Statutes.....	v
<i>District</i> —	
1. As to disbursing agents.....	157
<i>District Attorney</i> —	
1. A person employed by the Attorney-General under sections 363 and 366 of the Revised Statutes to assist a, is not an officer. Such employment is a professional retainer. See opinion Attorney-General Williams, June 6, 1874 (Op. Att. Gen., 406).....	355
2. Payment of.....	120
3. Power to retain fees, charges, and emoluments.....	120
4. Salary and fees of, where paid.....	120
<i>District Attorneys</i> —	
1. Allowances to.....	269
2. Districts assigned to.....	158
3. New duties of, Utah.....	121
<i>District Contracts Case</i>	198
<i>District Courts</i> —	
1. Territorial, business in.....	153
<i>District of Columbia</i> —	
1. As to administration.....	182

	Page.
<i>District of Columbia—Continued.</i>	
2. As to disbursements by Commissioners of.....	XIX
3. Authority of administrator appointed in	231
4. Claims against.....	13, 28
5. Common law and judicial system of.....	236
6. Form of government of	198
7. Insane alien wife, guardian, committee, or trustee of, how appointed in..	171
8. Powers of Commissioners in relation to contracts	198
9. Recognition of, in the matter of suits.....	238
10. Revised Statutes.....	260
11. Sale of lottery tickets in.....	260
<i>Districts—</i>	
1. Supervisors, as to	252
<i>Division—</i>	
1. Of bonds, contracts, and powers of attorney.....	285
<i>Divisions—</i>	
1. Of First Comptroller's office, as to work in.....	XX
<i>Dixon and Windsor—</i>	
1. Parties in Dorsey's appeal case.....	2
<i>Domestic Animals—</i>	
1. Diseases of.....	94
<i>Domicile—</i>	
1. As to administrator's, and Treasury drafts.....	231
2. As to disposition of United States bonds	197
3. Of aliens.....	170
4. Of wife merges in that of husband	174
5. Of wife of alien husband.....	170
6. United States have no particular.....	183
7. Without nationality.....	173
<i>Donations—</i>	
1. For hospitals.....	49
<i>Dorsey, John W.—</i>	
1. Contract for carrying mails.....	1
2. Party in Dorsey's appeal case.....	1
<i>Dorsey's Appeal Case</i>	1
<i>Double Pay—</i>	
1. As to a seat in Congress.....	327
<i>Double Taxation—</i>	
1. As to	395
<i>Douglass, George L.—</i>	
1. Attorney in Atherton and Co.'s case.....	316
2. Attorney in Malakof Bitters case.....	130
3. Counsel for Sanborn.....	208
<i>Douglass, John W.—</i>	
1. Attorney in Atherton and Co.'s case.....	316
<i>Draft—</i>	
1. After issue of, court cannot interfere.....	XXXIX
2. As to limit of time for recalling	XXXIII
3. As to rights of rival claimants to proceeds of	XXXIX
4. Copy of, issued from United States Treasury.....	231
5. Decree of court of equity as to surrender of.....	241
6. Decree of court will operate, after payment of, to determine the right to the fund.....	XXXIX
7. Effect of destruction of, as to right of payment.....	241

	Page.
<i>Draft—Continued.</i>	
8. Indorsement of.....	190
9. In possession of person beyond reach of official process, as to rights of party named in warrant authorizing	231
10. Is equivalent to money, when indorsed.....	233
11. Loss or destruction of	231
12. Mode of revoking, before actual payment.....	XXVIII
13. Of consular officer, how paid.....	349
14. Payment in money without a	241
15. Payment of, as to rival claimants.....	XXXIX
16. Powers of attorney to indorse.....	25
17. Provision for issue of duplicate	233
18. Refusal to surrender to rightful claimant.....	241
19. Unlawful detention of	241
20. Upon Treasurer, how paid	25
<i>Drafts—(See Checks.)</i>	
1. Acceptance of, by officers or agents of Government	18
2. Are not payments.....	241
3. As substitutes for money or property	238
4. As to authority of courts over	XIX
5. As to indorsements on.....	XIX
6. As to ownership of.....	XIX
7. As to payment of claims	297
8. As to rights of creditors of holders of	XIX
9. As to rights of holders of	XIX
10. Authority to sign.....	60
11. Beyond power or control of courts	234
12. Drawn by army contractors.....	127
13. Effect of possession as to payment of	240
14. Indorsement of	14
15. Of mail contractors, negotiability of.....	128
16. Paper evidences of a right to demand or receive money.....	235
17. Payment of, for officer or agent of Government.....	18
18. Payment of Treasury	189
19. Statute regulating issue of duplicate.....	23
<i>Draft or Check—</i>	
1. As to drawing and signing.....	62
<i>Draughtsman—</i>	
1. As to.....	247
<i>Drawer—</i>	
1. Signature of, as to indorsements.....	189
<i>Druggist—</i>	
1. Liable in tort for loss or injury to purchaser.....	132
2. Responsibility of.....	132
<i>Duplicate Descriptions.—(See Conflicting Descriptions.)</i>	
<i>Duplicate Draft—</i>	
1. Issuance of.....	234
<i>Duplicate Warrants—</i>	
1. Disposition of.....	217
<i>Duplicate—</i>	
1. When Treasurer authorized to issue a	241
<i>Durkee, Joseph H.—</i>	
1. Party in Durkee's case.....	163
<i>Durkee's Case</i>	163
<i>Duties—</i>	
1. And responsibilities of the Public Printer.....	93

	Page.
Duties—Continued.	
2. And taxes, collection of.....	242
3. Of attorneys, &c., as to.....	XXVII
4. Of Deputy Comptroller.....	70
5. Of executors and administrators.....	191
6. Of officers intrusted with public revenues.....	60
7. Of the office of the Register of the Treasury—appendix.....	399
8. Of the office of the Treasury of the United States—appendix.....	399
Duty—	
1. As to, of those required to construe statutes.....	368
2. Imposed on officer by subcontract for carrying mails.....	1
3. Of Secretary of the Treasury as relate to accounting officers.....	XXXV
4. On a particular article, specific provisions for.....	161
E.	
Effect—	
1. Shall be given to every provision of statute.....	274
Election—	
1. Accounts of supervisors of.....	153
2. As to decision of supervisors of.....	XXV
3. Contest as to.....	322
4. Difference between evidence of, and.....	326
5. Of Representative or Delegate, as to.....	323
Election Supervisors' Case.....	153
Elementary Writers—	
1. Authority of, as to registered bonds.....	290
Elements—	
1. In construction of statutes.....	296
Emancipation—	
1. How celebrated.....	144
2. Proclamation of.....	343
Emoluments.—(See Compensation : Fees ; Pay ; Salary.)	
1. Fees and charges as to retention of, by district attorney.....	120
Employé—	
1. As to.....	247
Employés—	
1. Assignment by, of salary or compensation.....	XX
2. In Treasury Department, substitutes for.....	345
Enactment—	
1. Particular, prevails over general.....	228
Enrolling Clerk—	
1. As to.....	362
Epidemic Disease Case.....	225
Epidemic Diseases—	
1. Authority of President over expenditures for prevention of.....	225
Equal Civil Rights—	
1. As to.....	342
Equitable Interest—	
1. Assignment of claims could only pass an.....	18
Equitable Right—	
1. Of claimant to fractional part of bond.....	202
Equitable Rights—	
1. As to claim paid.....	XXXVIII
2. Power of executive officers to determine.....	193

	Page.
<i>Equities—</i>	
1. Between an assignor and the debtor.....	286
2. Liabilities as to latent	193
<i>Equity—</i>	
1. And good faith, impose an obligation to pay.....	112
2. As to.....	XXVIII
3. The rule in.....	146
<i>Equity Jurisdiction—</i>	
1. As to, when proceeds of a draft are a subject of.....	XL
<i>Errata—</i>	
1. Items of.....	II
<i>Erroneous Punctuation—</i>	
1. May be corrected.....	315
<i>Erroneous Representations—</i>	
1. Effect of, on contracts.....	210
<i>Error—</i>	
1. As to re-opening an account	XXXI
2. In description, how corrected.....	267
3. In judicial proceedings, as to a rehearing on rejected claims	XXVIII
<i>Estates—</i>	
1. As to disposition of registered bonds	191
2. Of non-residents, administration upon.....	233
<i>Estimates—</i>	
1. Of expenses of District of Columbia.....	199
<i>Estoppel—</i>	
1. As to payment of Treasury drafts	231
2. As to rights of purchaser of registered bonds.....	291
3. Blank assignment may operate by way of.....	203
4. Doctrine of.....	204
5. Government not ordinarily bound by an.....	210
<i>Evans's Case</i>	111
<i>Evans, Samuel P.—</i>	
1. Commissioned as marshal of the United States March 16, 1877.....	111
2. Not entitled to compensation.....	119
<i>Evidence—</i>	
1. As to assignments of bonds.....	290
2. As to certified balances for or against the United States as.....	XXXIX
3. As to form of.....	XXVIII
4. As to law of, in courts	XXIX
5. As to law of, in Treasury Department practice.....	XXIX
6. As to payment of salaries	XXX
7. As to question of time	343
8. Before accounting officers.....	122
9. Effect of certified balance as.....	XXXIX
10. Enabling accounting officers to pass upon claims as to	XXXIV
11. New and additional.....	134
12. Of a right of action.. ..	129
13. Of authority to indorse	190
14. Of destruction of part of bond, force of.....	200
15. Of indebtedness as to set-off	205
16. Of usage in Treasury Department, where found.....	XV
17. Of what law is.....	355
18. Procured through the agency of judges and courts	XXXIV
19. Reviewed by First Comptroller.....	XX
20. Rule as to parol.....	268
21. To establish mistake.....	136

	Page.
Examination—	
1. As to commissioner's per diem	269
2. Of collectors' offices	251
3. Of witnesses, as to	xxx
Exception—	
1. Difference between repeal and	368
Exceptions—	
1. As to ingrafting on	367
2. In statutes not to be enlarged by inference	14
3. Rule of construction regarding	29
Exchange—	
1. Provisions for payment of loss by	26
2. Of old material for new	53
Execution—	
1. Of assignment	184
2. Of assignments of interest in bonds	202
Executions—	
1. As to law of	xxx
Executor—(See Administrator ; Agent ; Assignee ; Foreign Guardian, &c.)	
1. Assignment of bonds to himself	184
2. As to claim by	xxxvii
3. As to rights of assignee	xli
4. As to salary due deceased public officer	270
5. As trustee, powers and duties of	190
6. Demanding payment of claim	xli
7. Of General Wool had right to reclaim money paid	211
8. Of General Wool, taxes paid by	210
9. Or administration, practice of Treasury Department, as to	231
10. Power of sole surviving	194
Executors—	
1. And administrators of deceased executors and administrators	191
Executive Administration—	
1. Conclusiveness of judgment of Comptroller	xxx
2. Independence of	xxiii
Executive Authority—	
1. As to rights to be enforced by	xxiii
Executive Decisions—	
1. Conclusiveness of	xxv
Executive Department—	
1. Aid to officers of	xxxv
2. As to claim made against any	xxxiii
3. As to interference of other branches of the Government	xvi
Executive Departments—	
1. As to	360
2. As to cases arising in, requiring decisions	xliii
3. As to claim or matter pending in any of the	xxxv
4. As to the administration of each of the	xxiii
5. Classes of questions requiring decisions in	xxvi
6. Common law and usage in	171, 181
7. Compensation of officers and employés in	219
8. Conclusiveness of findings and opinions of courts on	xxxv
Executive Officers—	
1. Action of, when equitable title of claimant is determined before making payment	xl
2. As to balances certified against	xxxix

	Page
<i>Executive Officers—Continued.</i>	
3. As to consideration of legal rights.....	XXXVIII
4. As to employment of judgment and discretion by.....	XXXIX
5. As to exercise of jurisdiction conferred upon.....	XXXIX
6. As to suit on bond of.....	XXXIX
7. As to suspension of warrant before final payment.....	XXXII
8. Construction of statutes by.....	26
9. Deal with the real ultimate rights of parties.....	177
10. Decisions of.....	181
11. Discretion of.....	108
12. Do not always adopt the principles of judicial decisions.....	XXV
13. Duty of, as to ancillary administrators.....	238
14. Duty of as to transfer of title to registered bonds.....	296
15. Interference of courts with.....	XXXIX, XL
16. Jurisdiction of, over questions decided in the Departments.....	XVI
17. Power of, as to equitable rights.....	198
18. Responsibility of.....	XXXVIII
19. Sometimes disregard judgments and decisions of courts.....	XXV
20. Sometimes pass upon the jurisdiction and authority of the courts.....	XXV
21. Take official notice of the ordinary meaning of words.....	134
22. To settle and adjust claims.....	96
<i>Executive National Common Law—</i>	
1. As to extraterritorial operation of.....	XXIII
2. Difference between the common law which prevails in the courts and..	XXIV
3. There is a well-defined system of.....	XXII
<i>Executive Power—</i>	
1. As to.....	300
2. Cannot be exercised as between private citizens.....	10
<i>Exigency Case.....</i>	92
<i>Exigency—</i>	
1. What is an.....	97
<i>Expedited Service—</i>	
1. As to carrying mails.....	2
<i>Expedition—</i>	
1. Sale of supplies to exploring or surveying.....	55
<i>Expenditures—</i>	
1. As to appropriations for the public health.....	229
2. As to authority for making.....	XVIII
3. Authority to make.....	148
4. For detecting violations of internal revenue.....	244
5. In excess of appropriations.....	93
6. Of National Board of Health.....	225
7. Reported by proper disbursing clerk to Fifth Auditor.....	143
<i>Expenses—</i>	
1. As to internal revenue.....	259
2. For collection of internal revenue.....	243
3. For trial and punishment of violators of internal-revenue laws.....	244
4. Incurred for a contested seat in the House, as to.....	324
5. Miscellaneous, of National Board of Health.....	286
6. Of county courts.....	153
7. Of depositing proceeds of sale.....	369
8. Of detailed clerks.....	249
9. Of District of Columbia, origin of funds to meet.....	199
10. Of inspectors and revenue agents.....	251
11. Of officers and employes of Board of Health.....	221

	Page.
<i>Expenses—Continued.</i>	
12. Of sales of land paid by receivers of public moneys.....	365
13. Of sale of old material.....	55
14. Of sales of old material, how paid.....	37
15. Of surveys of land.....	367
16. Of the Government for 1882.....	214
17. Of the territorial courts.....	120
18. Of United States courts.....	152
<i>Expenses of Courts—</i>	
1. When chargeable to United States.....	153
<i>Explanatory Matter—</i>	
1. As to.....	v
<i>Exploring Expeditions—(See Surveying Expeditions.)</i>	
<i>Exposition—</i>	
1. Of statutes.....	268
<i>Extension—</i>	
1. Of leave of absence.....	345
<i>Extra Compensation—</i>	
1. As to inhibition against.....	355
2. To a Representative.....	355
<i>Extra pay—(See Additional Compensation; Fees; Pay; Salary.)</i>	
1. As to carrying mails.....	2
2. To officers and employes of House of Representatives.....	362
<i>Extraordinary Expenses—</i>	
1. Incurred by ministerial officers.....	155
F.	
<i>False Description Case.....</i>	265
<i>Farms—</i>	
1. Tabular statement as to sale of.....	335
<i>Favoritism—</i>	
1. As to substitutes.....	347
2. Fraudulent combinations and corruptions.....	109
<i>Federal Courts—</i>	
1. Jurisdiction of, over common-law offenses.....	XXII
<i>Fees and Compensations—</i>	
1. Acts prescribing.....	XVIII
2. Prescribed by statute not payable to United States marshal holding over.....	111
<i>Fees and Salary—</i>	
1. Of district attorney, maximum.....	120
<i>Fees—(See Compensation.)</i>	
1. As to public lands.....	367
2. Charges and emoluments as to retention of, by district attorney.....	120
3. Of commissioners.....	268
4. Of inspectors.....	252
5. Of marshal for summoning jurors.....	163
6. Of marshals.....	90
7. Right to.....	367
<i>Felonies—</i>	
1. Appropriation for suppressing counterfeiting and similar.....	219
<i>Feme Covert—</i>	
1. Doctrine as to civil capacity of.....	177
<i>Fiduciaries—</i>	
1. As to indorsements.....	191

	Page.
<i>Field, Mr. Justice—</i>	
1. Definition of crime of rebellion	52
<i>Fifth Auditor—</i>	
1. As to consular accounts	350
2. As to matters reported by	XX
<i>File Clerk—</i>	
1. As to	362
<i>Files—</i>	
1. In Treasury Department, as to manuscript	XV
<i>Final Action—</i>	
1. Authorizing the payment of claims, as to	X XVIII
<i>Final Payment—</i>	
1. Warrant for, may be recalled and certificate be corrected before	XXXII
<i>Finances—</i>	
1. Report of the Secretary of the Treasury in 1857 on	64
<i>Financial Officer—</i>	
1. Of a corporation, authority and duties of	14, 31
2. Of a corporation, authority of, to indorse checks and drafts	14
3. Of a corporation can receive payment of claim from disbursing officer ..	14
4. Of a corporation, evidence of authority of	14
<i>Finder—</i>	
1. Of lost money or goods, responsibilities of	168
2. Of mutilated note	168
<i>Findings and Opinions of Courts—</i>	
1. Effect of, in Executive Departments	XXXV
<i>Fines—</i>	
1. As to carrying mails	2
2. Imposed by police court, disposition of	264
<i>First Auditor—</i>	
1. Accounts incident to illness and burial of late President Garfield, stated by	378
2. Account stated by, as to salary	297
3. As to matters reported by	XX
4. Report of, on account of Hoen & Co.	95
5. States accounts of the Treasurer of the United States	200
<i>Fiscal Agents—</i>	
1. Are under criminal as well as civil liabilities	65
2. Not depositaries, must not keep public moneys in their own custody	66
3. Of Government	65
4. Of Government forbidden to keep moneys advanced to them	60
<i>First Comptroller—</i>	
1. Accounts incident to illness and burial of late President Garfield adjusted and certified by	378
2. Action of, as to indorsements	191
3. And Deputy, officer to act in absence or sickness of both	283
4. Appeal to, from decision of Sixth Auditor	1
5. As a check upon the Secretary of the Treasury	XXI
6. As to authority of, to countersign warrants	XX
7. As to evidence reviewed by	XX
8. As to judicial authority of	XXIV
9. Balance certified by, as to salary	297
10. Cannot delegate power to countersign warrants	61
11. Chief clerk in office of, not an administrative officer	61
12. Chief clerk of office of, was not deputy of	61
13. Circular by, on account of disbursements for the public health	398

	Page.
<i>First Comptroller—Continued.</i>	
14. Countersigns warrant for payment of claims.....	16
15. Creation of office of Deputy.....	61
16. Decision by, in Atherton & Co.'s case.....	317
17. Decision by, in Clerks' Investigation case.....	245
18. Decision by, in De Bildt's case.....	173
19. Decision by, in Dorsey's Appeal case.....	5
20. Decision by, in Election Supervisors' case.....	154
21. Decision by, in Malakof Bitters case.....	131
22. Decision by, in Durkee's case.....	164
23. Decision by, in Garnet's case.....	272
24. Decision by, in Lake's case.....	310
25. Decision by, in Sanborn's case.....	208
26. Decision by, in Seaman-Relief case.....	139
27. Decision by, in Utah District Attorney's case.....	121
28. Decision by, in Walsh's case.....	126
29. Decision by, in Yorktown Centennial case.....	143
30. Does not act under authority of a superior.....	71
31. Duties of.....	76, 179
32. Duties of, as to public health.....	221
33. Extent and importance of jurisdiction of.....	xvii
34. Is the only officer who countersigns warrants.....	xxi
35. Jurisdiction by statute over appeals.....	5
36. Jurisdiction of, as to construction of appropriation acts.....	xx
37. Letter of, as to substituted attorneys.....	315
38. Matter for decision of.....	192
39. May increase, reduce, or refuse to allow amounts stated as due to claimants.....	xx
40. Necessity for printed decisions by.....	xvii
41. Not concluded by action of Commissioner of Internal Revenue.....	129
42. Of the Treasury Department, as to publication of decisions of.....	v
43. Opinion by, as to extra compensation to Representatives in Congress...	356
44. Opinion by, conclusive.....	102
45. Opinion by Elisha Whittlesey, as to permanent legislation.....	394
46. Opinion by, in Agency-Delegation case.....	63
47. Opinion by, in Appropriation-Extension case.....	215
48. Opinion by, in Barnett's case.....	200
49. Opinion by, in Board of Health case.....	223
50. Opinion by, in Claims-Assignment case.....	14
51. Opinion by, in Colbath's case.....	281
52. Opinion by, in Commissioners' Per Diem case.....	269
53. Opinion by, in Crowley's case.....	357
54. Opinion by, in Direct-Tax case.....	334
55. Opinion by, in District Contracts case.....	198
56. Opinion by, in Epidemic Disease case.....	227
57. Opinion by, in Gibson's case.....	288
58. Opinion by, in Halstead's case.....	234
59. Opinion by, in Huidekoper's case (second).....	157
60. Opinion by, in Kennard's case.....	187
61. Opinion by, in Informers' case.....	262
62. Opinion by, in Jordan's case.....	276
63. Opinion by, in Lost-Greenback case.....	167
64. Opinion by, in Osage Land case.....	366
65. Opinion by, in Otto's case.....	298
66. Opinion by, in Rheem's case.....	307

	Page.
<i>First Comptroller—Continued.</i>	
67. Opinion by, in Shelley's case.....	323
68. Opinion by, in Smith's case.....	363
69. Opinion by, in Substitute case.....	346
70. Opinion by, in Substitute-Attorneys case.....	314
71. Opinion by, in Tayloe's case.....	192
72. Opinion by, in Territorial Courts case.....	149
73. Opinion by R. W. Tayler regarding sale of old material.....	46
74. Performance of duties of.....	283
75. Power of, over warrant before final payment.....	XXXII
76. Reasons justifying publication of decisions of.....	XXII
77. Relations of, with the Treasury Department.....	XV
78. Responsibility of, as to issuing warrants.....	XXI
79. Revises and certifies Treasurer's accounts.....	200
80. To countersign all warrants.....	67
81. Warrant for payment countersigned by.....	XXXII
<i>First Comptroller's Decisions—</i>	
1. Conclusiveness of, in appeals from that of the Sixth Auditor.....	XXVII
<i>First Comptroller Tayler—</i>	
1. Opinion by, as to disposition of the proceeds of sale of old material.....	53
<i>Fixed Sum—</i>	
1. Special act of Congress directing payment of, creates a right.....	19
<i>Folger, Charles J.—</i>	
1. Opinion of, quoted.....	109
2. Secretary of the Treasury, letter of, as to consular accounts.....	349
3. Secretary of the Treasury, letter of, as to indorsements.....	192
<i>Foreign Court—</i>	
1. Suit by executor or administrator in.....	240
<i>Foreign Executors—</i>	
1. As to suits in the District of Columbia.....	239
<i>Foreign Guardian—</i>	
1. Rights of, over tangible property or ordinary claims.....	171
<i>Foreign Guardians—</i>	
1. Authority of, under statutes.....	171
<i>Foreign Intercourse—</i>	
1. Contingent expenses of.....	354
<i>Foreign Jurisdiction—</i>	
1. As to executors or administrators.....	180
2. As to suits by guardians.....	180
<i>Foreign Ports—</i>	
1. Detail of medical officers to.....	226
<i>Forfeiture—</i>	
1. As to a judgment of, by Sixth Auditor.....	7
2. Of subcontractor's pay for carrying mails.....	1
3. To require a, requires due process of law.....	10
<i>Forfeitures—</i>	
1. Of rights in which the Government has no interest cannot be declared by accounting officers.....	1
<i>Forged Indorsements—(See Indorsements.)</i>	
<i>Forged Indorsement—</i>	
1. Common-law rule changed by statute of 16 and 17 Victoria.....	188
<i>Form—</i>	
1. Copy of, for internal-revenue agents' monthly-expense account.....	257
2. For miscellaneous-expense account, copy of.....	258
<i>Form of Account—</i>	
1. As to illness and burial of late President Garfield.....	374

	Page,
<i>Form of Oath—</i>	
1. Annexed to claim as to illness and burial of late President Garfield	374
<i>Form of Release—</i>	
1. As to illness and burial of late President Garfield.....	375
<i>Forms and Instructions—</i>	
1. To claimants, as to.....	373
<i>Forms—</i>	
1. Authority of Secretary of Treasury to prescribe.....	242
2. For assignment of registered bonds.....	288
3. Of authority of financial officer of corporation quoted.....	31
<i>Fourth of July—</i>	
1. How celebrated.....	144
<i>Fractional Currency—</i>	
1. Redemption of.....	167
<i>Fragments—</i>	
1. Of United States notes, &c	167
<i>France—</i>	
1. Government and people of, invited to Centennial Anniversary of surrender of Lord Cornwallis	141
2. Public funds of, not negotiable.....	293
<i>Franking Privilege—</i>	
1. As to rights of Congressmen.....	441
<i>Fraud—</i>	
1. As to disputed titles to land.....	XLI
2. In transfers and powers of attorney.....	17
<i>Frauds—</i>	
1. In insurrectionary districts	XXXVIII
2. On the Government	249
3. Prevention of.....	XXXVIII
4. Upon internal revenue.....	251
5. Upon the Treasury, act to prevent	23
<i>Fraudulent Representations—</i>	
1. Made by druggists.....	132
<i>Free Persons—</i>	
1. Of African descent, as to.....	338
<i>Freedman's Hospital and Asylum—</i>	
1. Support of	397
<i>Frelinghuysen, Frederick T.—</i>	
1. Secretary of State, letter of, as to consular accounts.....	350
<i>French Guests—</i>	
1. Provision for inviting in affirmative terms.....	142
<i>French, H. F.—</i>	
1. Assistant Secretary, question raised by, as to account of Richard Crowley.....	356
<i>Fruit—</i>	
1. As to deficiency tax	318
<i>Full Compensation—</i>	
1. Appropriation made in	297
2. Force of expression in appropriation act.....	215
<i>Functions—</i>	
1. Of office of Representative, who may exercise.....	326
<i>Fund—</i>	
1. Administration of Marine-Hospital.....	53
2. To aid in colonization	334
<i>Funds—(See Government Funds.)</i>	

	Page.
<i>Future Salary—</i>	
1. Assignments of	34
G.	
<i>Garfield's Case.....</i>	372
<i>Garnet's Case.....</i>	270
<i>Garnet, Henry H.—</i>	
1. Party in Garnet's case	270
<i>Garnet, Sarah J. S.—</i>	
1. Party in Garnet's case	270
<i>Garnishee—</i>	
1. Attachment and process,.....	27
<i>Garrison, C. K.—</i>	
1. Contract of, for 6,000 rifles	85
<i>Gaugers—</i>	
1. As to.....	252
<i>General Inspectors—</i>	
1. As to.....	252
<i>General La Fayette—</i>	
1. Family of, invited to Centennial Anniversary of Surrender of Lord Cornwallis.....	141
<i>General Land Office—</i>	
1. Demands settled by Commissioner of.....	IX
<i>General Legislation—</i>	
1. As to appropriations.....	339
2. Engrafted on appropriation acts	340
3. On appropriation acts.....	298
<i>General Order—</i>	
1. Of President in case of absence or sickness of Bureau officers.....	283
<i>General Power—</i>	
1. Effect of limitation on.....	152
<i>General Principles—</i>	
1. As to settlement of.....	XVII
2. As to statement of, by Comptroller.....	XLII
<i>General Provisions—</i>	
1. Of one statute controlled by specific provisions of another.....	365
<i>General Rule—</i>	
1. Express authority to one excludes all others.....	60
2. Of law as to judgments, decrees, or other orders of courts	XXXII
<i>General Words—</i>	
1. Are to have general application	151
2. Of statute may be restrained.....	160
3. Sometimes restrained in their application.....	228
<i>German Guests—</i>	
1. As to expenses of	141
2. Duly invited by authority of law.....	145
3. Invitation and payment of expenses of authorized.....	143
<i>Gibson's Case.....</i>	286
<i>Gibson, William J.—</i>	
1. Party in Gibson's case.....	286
<i>Gilfillan, James—</i>	
1. United States Treasurer, letter of, as to indorsements.....	191
<i>Gillmore, Major-General—</i>	
1. Order of, as to reconstruction.....	343

	Page.
Goods and Credits—	
1. As to disposition of United States bonds.....	197
Government—	
1. As to interference of other branches of, with the executive department..	xvi
2. As to liability of.....	107
3. As to liability of, to refund taxes	xix
4. As to refund of moneys by, to purchasers of public lands erroneously sold	xix
5. As to the co-ordinate departments of.....	xxiii
6. Cannot without its assent be made a debtor.....	18
7. Can only act by authorized agents.....	209
8. Complicated machinery of	xxiv
9. Counter-claims on the part of.....	xxxvii
10. Decree of courts determining rights of rival claimants not conclusive on.	xxxiv
11. Difference in the applicability of principles of law between private per- sons and the.....	xxiv
12. Duties of, as to bonds.....	194
13. Essentials to proper action of.....	xxiv
14. Law of claims against.....	342
15. Legal science pertaining to the great departments of.....	xxxiii
16. Liabilities of contractor for carrying mails	4
17. Liability of, as to registered bonds.....	190
18. Liability of, as upon a <i>quantum valebat</i>	106
19. Liability of officers to.....	xix
20. Not liable for compensation for services by unauthorized officers, agents, or employes.....	113
21. Of District of Columbia.....	198
22. Of law, this is a.....	147
23. Of the United States as to contracts with	xxvii
24. Of the United States, control of.....	238
25. Payments made by, estop further demands.....	14
26. Powers of, how distributed.....	181
27. Set-offs on the part of.....	xxxvii
28. Silence of, ratification of the acts of a <i>de facto</i> officer, but not of his title.	112
29. Temporary expenses of.....	214
30. The, not liable for goods furnished not}authorized by express or implied contract.....	106
31. Usages established in every department of.....	xxiv
Government Bond—	
1. As to disputed ownership of.....	xxxiv
Government Bonds—(See Bonds.)	
1. As to titles to	xviii
2. Held in trust as to.....	xxxiv
Government Funds—	
1. As to relief for loss of.....	xxxviii
Government Hospital—	
1. For the Insane.....	57
Government Officers—	
1. Detail of, as to health	226
Government of District of Columbia—	
1. As to.....	360
Government of the United States—	
1. As to debts and promises	236

	Page
<i>Government Printing Office—</i>	
1. As to.....	360
2. Material and machinery for.....	93
<i>Governments—</i>	
1. Organized loyal State	343
<i>Governor—</i>	
1. Of Alabama, special election ordered by.....	322
<i>Grain—</i>	
1. As to deficiency tax	315
<i>Gratuity—</i>	
1. To widow of deceased public officer.....	270
<i>Gravel and Stone—</i>	
1. Delivered, action to recover value of.....	109
<i>Great and Little Osage Indians—</i>	
1. Treaty with.....	371
<i>Greenback—</i>	
1. As a promissory note.....	167
<i>Greenbacks—</i>	
1. Regulations relative to redemption of.....	200
<i>Gross Proceeds of sale of old Material—</i>	
1. How covered into the Treasury.....	36
2. Receiver should be charged with.....	369
<i>Guardian—(See Executor; Administrator.)</i>	

H.

<i>Hall, Hiland—</i>	
1. Second Comptroller, decision of, as to powers of Sixth Auditor.....	13
<i>Halstead, Eminel P.—</i>	
1. Party in Halstead's case.....	232
<i>Halstead's Case.....</i>	231
<i>Hamilton, Alexander—</i>	
1. Remarks of, as to issuing warrants.....	XXI
2. Works of, vol. 7, p. 548, quoted, as to duties of Secretary and Comptroller	XXI
<i>Hayti—</i>	
1. As to emigration or colonization	334
<i>Head of Department—</i>	
1. As to references to Court of Claims	XXXV
2. As to transmittal of documents to Court of Claims.....	XXXVIII
3. Authority and duties of, as to substitutes.....	345
4. Disbursements under directions of.....	225
5. Duties and responsibilities of	XXIV
6. Exercise of duties and powers of.....	XXIV
7. First Assistant of, may perform duties of.....	283
8. May require opinion of the Attorney-General.....	XVI
9. Must act on his own judgment.....	XVI
10. Power of, to appoint special agent.....	159
11. Right of judging as to expediency of advances.....	XXI
12. And bureaus, aids provided for by Congress.....	73
<i>Heads of Departments—</i>	
1. As to authority to appoint agents, of the	XVIII
2. Authority to employ agents by.....	60
3. Secretaries or deputies of the President	72
<i>Heads of Families—</i>	
1. Sales of lands to.....	234

	Page.
<i>Health Regulations—</i>	
1. Reports as to.....	226
<i>Hearing and Deciding—</i>	
1. On criminal charges.....	268
<i>Herbert, Hilary A.—</i>	
1. Letter of, as to pay of deceased contestant.....	328
<i>Heritage—</i>	
1. Public lands regarded as a.....	370
<i>Heritages—</i>	
1. As to.....	20
<i>History of Statute—</i>	
1. As to construction of.....	315
<i>History—</i>	
1. Sacred and profane.....	144
<i>Hobson, H. P.—</i>	
1. Party in Halstead's case.....	232
<i>Hodge, Andrew—</i>	
1. Party in Gibson's case.....	294
<i>Hoen & Co.—</i>	
1. Account of, stated by First Auditor.....	95
<i>Holder of Certificates—</i>	
1. Of election rights of.....	323
<i>Holder of Legal Title—</i>	
1. Estopped by payment of holder of equitable title.....	XIII
<i>Holder of Negotiable Instrument—</i>	
1. Indorsed for value, rights of.....	286
<i>Holder—</i>	
1. Of one-half a matured bond, right of.....	200
2. Risk of payment to rightful.....	188
<i>Holders of Bonds—</i>	
1. Last of several successors.....	204
<i>Homestead Legislation—</i>	
1. Referred to.....	370
<i>Homestead Policy—</i>	
1. Public lands subjected to.....	370
<i>Homesteads—</i>	
1. To soldiers, bill giving, introduced by Hon. William Lawrence, referred to.....	371
<i>Hooker, I.—</i>	
1. Party in Seaman Relief case.....	138
<i>Hovey, Charles E.—</i>	
1. Attorney in Walsh's case.....	126
<i>Hospital Aid—</i>	
1. As to public health.....	221
<i>Hospitals—</i>	
1. Donations for.....	49
<i>House of Representatives—</i>	
1. Resolution adopted by, quoted.....	378
2. Right of widow of contestant.....	328
3. Speaker of.....	22
<i>House—</i>	
1. Rule of, as to appropriations.....	339
<i>Huidekoper, H. S.—</i>	
1. Party in Huidekoper's case.....	156
<i>Huidekoper's Case—(second).....</i>	155
<i>Hunter's Case—</i>	
1. Referred to.....	111

	Page.
<i>Husband—</i>	
1. May waive marital rights over wife's property in bonds or interest checks.	177
2. Rights of.....	170
I.	
<i>Illness and Burial—</i>	
1. Of late President Garfield, as to.....	372
<i>Impeachment—</i>	
1. As to meaning of civil officer.....	358
2. As to power of.....	XXIII
3. Of decisions of Commissioner of Patents.....	77
<i>Implication—</i>	
1. Result of, necessary.....	152
<i>Implied Power—</i>	
1. Of delegations by heads of Departments.....	63
<i>Importer—</i>	
1. As to construction of revenue acts.....	283
<i>Imports—</i>	
1. Raising revenue from.....	242
<i>Imprisonment—(See Commissioner, Warrant.)</i>	
<i>Inchoate Rights—</i>	
1. Of widow as to.....	272
<i>Incidental Expenses—</i>	
1. Of registers and receivers.....	369
<i>Income Tax—</i>	
1. Assessment of, in late insurrectionary States.....	275
2. Repayment of internal revenue.....	274
<i>Incompatible Office—</i>	
1. Acceptance of.....	346
<i>Inconsistent Provisions—</i>	
1. In a subsequent act, as to.....	341
<i>Increase—</i>	
1. Of rates of salary.....	214
2. Of salary by act of August 5, 1882, effect of provisions for.....	216
<i>Indefinite Appropriations—</i>	
1. As to.....	XIX
<i>Indemnity Bonds—(See Bonds.)</i>	
<i>Indenture—</i>	
1. Offered in evidence.....	136
<i>Indian Affairs—</i>	
1. As to sale of lands.....	365
<i>Indian Civilization Fund—</i>	
1. Origin of.....	371
<i>Indian Land Case—</i>	
1. Opinion in, re-examined and affirmed.....	365
<i>Indian Land—</i>	
1. As to sale of.....	366
<i>Indian Lands—</i>	
1. Fees as to.....	367
<i>Indian Territory—</i>	
1. Removals to.....	366
<i>Indian Treaties—</i>	
1. Practice of making sales of Indian land by authority of.....	369
2. Provisions prohibiting.....	370

	Page.
<i>Indian Tribe—</i>	
1. Civilization of.....	371
<i>Indians—</i>	
1. Appropriation acts in relation to.....	366
2. Contracts with	15
<i>Individual Rights—</i>	
1. As to determination of.....	XVII
2. Decisions of the Supreme Court as to.....	XLII
<i>Individuals—</i>	
1. As to suits brought by the United States against	XXIX
<i>Indorsement—</i>	
1. As guarantee of genuineness of prior indorsement.....	189
2. As to negotiable instruments.....	292
3. A valid blank	188
4. By Secretary Folger forbidding assignment of Government employé of his accruing salary	17
5. Forged or unauthorized, of pension checks.....	185
6. Of checks and drafts.....	31, 32
7. Of interest check.....	184
8. Of interest checks by alien husband of insane wife.....	171
9. Of payee or legal representatives.....	233
10. Of pension checks, samples of.....	185
11. Of Treasury drafts, as to	232
12. As to acquittance, if payment is made on forged	187
<i>Indorsements—</i>	
1. As to incomplete.....	288
2. By mark	190
3. In blank on registered bonds.....	286
4. Of pension checks, as to.....	186
5. Payment of pension checks having several	185
6. Responsibilities of parties.....	188
7. Subsequent special	188
<i>Indorser—</i>	
1. Admitting genuineness of prior indorsements.....	189
2. Responsibility of subsequent.....	188
3. Warrants instrument throughout	189
<i>Inference—</i>	
1. Exceptions in statutes not to be enlarged by	14
<i>Influence—</i>	
1. Brought to support payment of salary.....	19
<i>Information—</i>	
1. Difficulty of obtaining.....	XV
2. Furnished by the decisions of the Attorney-General.....	XV
3. Moiety of money recovered through, given for.....	212
<i>Informer—</i>	
1. Pay of officer and employé as an	260
<i>Informer's Case.....</i>	260
<i>Informers—</i>	
1. Circular concerning rewards to.....	245
2. Contract between Government and	205
<i>Ingersoll, Robert G.—</i>	
1. Attorney in Dorsey's Appeal case.....	4
<i>Ingredients—</i>	
1. For medicated bitters.....	134

	Page.
<i>Inheritance—</i>	
Shakespeare quoted as to.....	19
<i>Injunction—</i>	
1. As to	222
2. As to judicial proceedings against accounting officers.....	XXXVI
3. General power of court by.....	XXXVI
4. Of secrecy in Senate as to Indian land treaties	370
5. Who may have a writ of.....	XXXVI
<i>Injunctions—</i>	
1. In courts	146
<i>Innocent Parties—</i>	
1. Which of two must suffer loss.....	204
<i>Insane Person—</i>	
1. Responsibilities of foreign guardian of	171
<i>Insane Wife—</i>	
1. How guardian, committee, or trustee of, may be appointed in District of Columbia when an alien.....	171
<i>Insanity—</i>	
1. Adjudication of question of.....?	184
<i>Inspection Stations—</i>	
1. As to the public health.....	221
<i>Inspectors—</i>	
1. Appointment of	251
2. As to the public health.....	224
3. Districts assigned to.....	158
4. Of customs at ports.....	158
<i>Instructions—</i>	
1. Furnished in decisions of Court of Claims	xv
2. Of Secretary Boutwell, deposits.....	53
3. Of Secretary of the Treasury as to sale of old material	47
4. To commissioners	269
<i>Insurrection—</i>	
1. As to	336
2. As to reconstruction of States.....	343
<i>Insurrectionary Districts—</i>	
1. Collection of direct taxes in.....	334
2. Frauds in	XXXVIII
<i>Intangibilities—</i>	
1. As to domicile.....	235
<i>Intent—</i>	
1. As to transfer of title	203
<i>Intention—</i>	
1. Effect should be given to clear.....	91
2. Force of, as to construction of statutes	225
3. In subsequent, as to effect, of in prior statute.....	365
4. Of Congress as to claims.....	380
5. Of Congress controlling element in construing statute.....	274
6. Particular and general.....	312
7. Probability of	152
<i>Interest Coupons—</i>	
1. As to payment of	XXVII
<i>Interest—</i>	
1. Excessive, paid by clerks to brokers	17
2. On registered bonds	287
<i>Interest Checks—</i>	
1. And bonds, transfer and control of	179

	Page.
<i>Interior Department—</i>	
1. Action of disbursing officers of, as to powers of attorney	33
2. As to Commissioner of General Land Office in	xxvi
3. As to findings and opinions of Court of Claims in relation to	xxxv
4. Secretary of, letter to First Comptroller	37
<i>Internal Revenue Agents—</i>	
1. Employment of	242
2. Payment of salaries of	243
<i>Internal Revenue Bureau—</i>	
1. No term for the transaction of business in	xxxii
<i>Internal Revenue—</i>	
1. Detecting violations of	242
<i>Internal Revenue Laws—</i>	
1. History and course of legislation in relation to	251
<i>Internal Revenue Office—</i>	
1. Paper from, filed in Atherton & Co.'s case, copy of	317
<i>Internal Revenue Tax—</i>	
1. As to	274
<i>International Law—</i>	
1. As to	xxiii
2. Regarding marriage contracts	175
<i>Interpleader—</i>	
1. As to bill of	xxxiv
2. As to rights of rival administrators	241
<i>Interpolations—</i>	
1. As to meaning of statutes	283
<i>Interpretation—</i>	
1. Of statutes	320
<i>Interpretations—</i>	
1. Rule in construing statutes	270
<i>Intestates—</i>	
1. As to assets or trusts	191
<i>Introduction</i>	xv
1. To first volume of Decisions, as to	xvii
<i>Intruder—</i>	
1. An, into an office will not be permitted to take advantage of his own wrong	118
<i>Investigations—</i>	
1. As to	xxx
<i>Investigators—(See Agents.)</i>	
<i>Irritation—</i>	
1. Reception and entertainment of the Government and people of France and the family of General La Fayette	141
<i>Items of Expenses—</i>	
1. As to illness and burial of late President Garfield	375
J.	
<i>Janitors—</i>	
1. As to	306
<i>Jobbing—</i>	
1. The statute against	438
<i>Joint Commission—</i>	
1. As to settlement of claims under	237
<i>Joint Committee—</i>	
1. Force of assent of	97
2. On Public Printing	94

	Page.
<i>Jordan, Edward L.—</i>	
1. Party in Jordan's case	274
<i>Jordan's Case</i>	274
<i>Joint Resolution—</i>	
1. As to appropriations, terms and effect of	216
2. Authorizing publication of First Comptroller's Decisions	v
3. Of Congress extending appropriations	213
4. Of Congress for expenses of Government, quoted	214
5. Of Congress for relief of Sarah J. S. Garnet	270
6. Of Congress regarding reconstruction of government of Tennessee	344
7. Of July 4, 1864, 5 per cent. income tax	274
8. Of March 2, 1867, claim of person opposed to the rebellion	22
9. Of February 18, 1881, approved	141
10. Of February 18, 1881, authority given by	144
11. Of February 18, 1881, French guests	144, 145
12. Of February 18, 1881, inviting French guests to Centennial Anniversary at Yorktown	141
13. Of February 18, 1881, quoted from	142
14. Of March 2, 1881, agricultural reports	99
15. Of March 2, 1881, as to printing certain annual reports	93
16. Of March 2, 1881, report of Commissioner of Agriculture	93
17. Of March 3, 1881, Yorktown Centennial Anniversary	142
18. Of June 30, 1882, expenses, agents	243
19. Of June 30, 1882, referred to	243
20. Of July 4, 1864, referred to	274
21. Of July 24, 1866, referred to	344
22. Of July 20, 1868, reconstruction	344
23. Of July 20, 1868, damaged ordnance stores	56
24. Of July 20, 1868, net proceeds of sales	39
25. Of July 20, 1868, sale of ordnance stores	41
26. Of August 1, 1882, quoted	271
27. Of August 1, 1882, relief of Sarah J. S. Garnett	270, 271
28. Of August 3, 1882, providing for publication of First Comptroller's De- cisions	v, xv
29. Of August 3, 1882, quoted	v
30. Of August 3, 1882, referred to	xv
31. Of August 5, 1882, extending appropriations	213
<i>Joint Resolutions—</i>	
1. Object of	216
2. Of February 18, 1869, referred to	344
<i>Journal Clerk—</i>	
1. Annual salary of	362
2. Of House, as to	362
<i>Judge—</i>	
1. Immunity of	xxxvii
<i>Judgment—</i>	
1. Accounting officer must act on his own	xvi
2. Head of Department must act on his own	xvi
3. In the courts operates as <i>res adjudicata</i> , which could have been acted on ..	xxiv
4. In United States courts, as to	xxix
5. Of accounting officers, as to	xxi
6. Of a Comptroller cannot be opened or changed	xxxi
7. Of Comptroller as to conclusive effect of	xxxii
8. Of Comptroller, execution of, is by warrant or payment	xxxii

	Page.
<i>Judgment—Continued.</i>	
9. Of First Comptroller conclusive on executive officers and on claimants..	xxx
10. Relation between courts and Departments.....	xxxv
11. Reversing, cause for.....	147
<i>Judgment Debts—</i>	
1. Assets, where judgment is recorded.....	235
<i>Judgments—</i>	
1. Against United States, assignments of.....	13
2. And decrees as to law of.....	xxx
3. As to.....	xxxii
4. As to control of courts over.....	xxxii
5. Disposition of moneys collected upon.....	264
6. In Court of Claims.....	28
7. Interlocutory and final, as to.....	xxx
<i>Judgments and Decrees—</i>	
1. Of courts, as to finality of.....	xxxi
<i>Judges of Courts—</i>	
1. Salary of, protected by Constitution.....	119
<i>Judications—</i>	
1. By accounting officers, there must be an end to.....	xxxi
<i>Judicial Authority—</i>	
1. Affecting claims after final action with accounting officers.....	xxxiv
2. As to determination of equitable rights.....	xxxviii
3. As to exercise of, against accounting officers	xxxiv
4. Exercise in aid of accounting officers	xxxiv
5. Extent of, defined by judicial decisions.....	xxxix
6. Relation of accounting officers, to	xxi, xxxiv
7. Seeking to affect action of accounting officers on claims	xxxiv
<i>Judicial Control—</i>	
1. Over attorneys, &c., as to.....	xxvii
<i>Judicial Courts—</i>	
1. Error in.....	146
<i>Judicial Decisions—</i>	
1. Defining extent of judicial authority.....	xxxix
<i>Judicial Discretion—</i>	
1. Conferred by law.....	146
<i>Judicial Interference—</i>	
1. As to, prior to final action of Treasury Department	xxxix
<i>Judicial National Common Law—</i>	
1. There is no general system of	xxii
<i>Judicial Officer—</i>	
1. Cannot make a deputy.....	79
<i>Judicial Officers—</i>	
1. Of Utah, as to.....	150
<i>Judicial Offices—</i>	
1. As to.....	74
<i>Judicial Power—</i>	
1. As to	360
<i>Judicial Proceedings—</i>	
1. As to effect of certified balances, evidence in	xxxix
<i>Judicial Remedy—</i>	
1. Afforded by statute	200
<i>Judiciary—</i>	
1. Of the United States, as to the.....	xxii

	Page
<i>Jurisdiction—</i>	
1. Exercised by Comptroller, general approval of	xvii
2. Given to courts over Departmental matters	xvi
3. In granting letters of administration.....	232
4. Of accounting officers.....	xvi
5. Of accounting officers, as to.....	xlii
6. Of accounting officers, as to assignment of claims	18
7. Of accounting officers, extent of.....	xvii
8. Of accounting officers over claims and demands.....	23
9. Of administrator	152
10. Of Court of Claims as to claims for damages	xxix
11. Of Court of Claims as to counter-claims.	xxix
12. Of Court of Claims as to set-offs.....	xxix
13. Of courts invoked in aid of accounting officers	xxxiv
14. Of Departments in relation to set-offs	xxix
15. Of executive officers and of courts, comparison as to.....	xvii
16. Of executive officers, as to disposition of bonds.....	196
17. Of executive officers over questions decided in the Departments	xvi
18. Of First Comptroller as to construction of appropriation acts.....	xx
19. Of First Comptroller as to payment of fractional part of bond.....	200
20. Of First Comptroller, extent and importance of.....	xvii
21. Of First Comptroller over appeals.....	5
22. Of First Comptroller over appeals from Sixth Auditor	xx
23. Of one Department generally conclusive on the others	181
24. Of States as to control of property	234
25. Original and appellate, as to issuing and countersigning warrants.....	xxvii
26. Over assignment of bonds and interest checks.....	179
<i>Jurors—</i>	
1. Fees for summoning.....	164
2. Summoned by township officers.....	163
<i>Justices of the Peace—</i>	
1. Discretionary powers of	74
<i>Justice Story—</i>	
1. General rule by, regarding public officer	77
K.	
<i>Kansas—</i>	
1. Osage ceded lands in	366
<i>Karst, L. G.—</i>	
1. Party in Lost Greenback case	166
<i>Kennard's Case</i>	185
<i>Kennard, M. P.—</i>	
1. Party in Kennard's case	185
<i>Key—</i>	
1. Which opens Treasury.....	85
L.	
<i>Laborer—</i>	
1. As to	247
<i>Laborers—</i>	
1. Substitutes for	345
<i>Lake's Case.....</i>	309
<i>Lake, John L.—</i>	
1. Party in Lake's case	310
<i>Land—</i>	
1. Assessment of taxes on	334

	Page.
<i>Land</i> —Continued.	
2. As to interference of courts with issue of patents for.....	XL
3. Expense of sales of	365
<i>Lands</i> —	
1. Leasing and resale of, purchased for non-payment of taxes.....	334
2. Sale of, for non-payment of taxes	334
<i>Land Office</i> —	
1. Action of, as to disputed titles	XLI
2. As to certification of a right to a patent.....	XLI
<i>Land Offices</i> —	
1. Receivers of public moneys	158
2. Registers of district	158
<i>Land Warrants</i> —	
1. As to signing of	69
<i>Language</i> —	
1. Of a statute, construction of, when ambiguous.....	321
<i>Language</i> —	
1. Of one clause assists in construing that of another	365
2. Of statute as to payment of claims considered	16
<i>Larceny</i> —	
1. Or destruction of papers and records	24
<i>Last Will and Testament</i> —	
1. Henry H. Garnet.....	271
<i>Latent Equities</i> —	
1. Parties having	193
<i>Law</i> —	
1. Assignments by operation of.....	13
2. As to enforcement of penalties of private parties.....	1
3. As to sources of	XXIII
4. Contradictory decisions on similar questions of.....	XV
5. Of agency.....	245
6. Of executions as to.....	XXX
7. Of judgment and decrees	XXX
8. Of <i>res adjudicata</i> and <i>stare decisis</i> as to	XXX
9. Presumption of intended change of	365
10. Questions of, arising in the First Comptroller's Office.....	XV
11. Questions of, as to wills	194
<i>Law-maker</i> —	
1. As to intention of	358
<i>Law of Claims</i> —	
1. Against Governments.....	342
2. Against Governments, Lawrence's	343
<i>Law of Congress</i> —	
1. Claims founded on.....	XXXVII
<i>Law of Sweden</i> —	
1. In relation to marriage contract	171
<i>Lawrence, William</i> —	
1. Bill giving soldiers public lands, referred to.....	370
2. First Comptroller, decision by, in Atherton & Co.'s case.....	317
3. First Comptroller, decision by, in Clerks' Investigation case	245
4. First Comptroller, decision by, in De Bildt's case	173
5. First Comptroller, decision by, in Dorsey's appeal.....	5
6. First Comptroller, decision by, in Durkee's case.....	164
7. First Comptroller, decision by, in Election Supervisors' case.....	154
8. First Comptroller, decision by, in Evans's case.....	113

Lawrence, William—Continued.

9. First Comptroller, decision by, in Exigency case.....	96
10. First Comptroller, decision by, in Garnett's case	272
11. First Comptroller, decision by, in Malakof Bitters case.....	131
12. First Comptroller, decision by, in Marshal's Mileage case.....	89
13. First Comptroller, decision by, in Sanborn's case.....	208
14. First Comptroller, decision by, in Seaman-Relief case.....	139
15. First Comptroller, decision by, in Utah District Attorney's case.....	121
16. First Comptroller, decision by, in Walsh's case	126
17. First Comptroller, decision by, in Yorktown Centennial case.....	143
18. First Comptroller, letter of, as to consular accounts	350
19. First Comptroller, opinion by, in Agency Delegation case.....	63
20. First Comptroller, opinion by, in Appropriation Extension case	215
21. First Comptroller, opinion by, as to extra compensation to Representa- tives in Congress.....	356
22. First Comptroller, opinion by, in Barnett's case	200
23. First Comptroller, opinion by, in Board of Health case.....	223
24. First Comptroller, opinion by, in Claims Assignment case.....	14
25. First Comptroller, opinion by, in Clerks' Investigation case.....	245
26. First Comptroller, opinion by, in Colbath's case.....	281
27. First Comptroller, opinion by, in Commissioners' Per Diem case.....	269
28. First Comptroller, opinion by, in Contestant's Widow's case	329
29. First Comptroller, opinion by, in Crowley's case.....	357
30. First Comptroller, opinion by, in Direct Tax case	334
31. First Comptroller, opinion by, in District Contracts case	198
32. First Comptroller, opinion by, in Epidemic Disease case	227
33. First Comptroller, opinion by, in False Description case	267
34. First Comptroller, opinion by, in Gibson's case.....	288
35. First Comptroller, opinion by, in Halstead's case	234
36. First Comptroller, opinion by, in Huidekoper's case (second)	157
37. First Comptroller, opinion by, in Informer's case.....	262
38. First Comptroller, opinion by, in Jordan's case.....	276
39. First Comptroller, opinion by, in Kennard's case.....	187
40. First Comptroller, opinion by, in Lake's case.....	310
41. First Comptroller, opinion by, in Lost Greenback case.....	167
42. First Comptroller, opinion by, in Osage Land case.....	366
43. First Comptroller, opinion by, in Otto's case	293
44. First Comptroller, opinion by, in Proceeds of Sales case.....	40
45. First Comptroller, opinion by, in Rheem's case	307
46. First Comptroller, opinion by, in Shelley's case	323
47. First Comptroller, opinion by, in Smith's case	363
48. First Comptroller, opinion by, in St. Elizabeth's case	57
49. First Comptroller, opinion by, in Substituted-Attorneys case.....	314
50. First Comptroller, opinion by, in Substitute case.....	347
51. First Comptroller, opinion by, in Tayloe's case	192
52. First Comptroller, opinion by, in Territorial Court case.....	149
53. Speech of, in Congress, as to sales of lands referred to.....	369

Laws—

1. Of domicile	170
2. Of marriage.....	170
3. Of place of domicile, as to indorsements by husband.....	173
4. Of place of issue of securities, as to indorsements by husband	173
5. Of place of marriage, as to indorsements by husband	173
6. Of place where post-nuptial contract is made, effect of.....	170
7. Of the United States, publication and distribution of.....	v

Laws—Continued.

2. Relating to disbursements by the Commissioners of the District of Columbia XIX

Lawyers—

1. As to skill and learning required in disposition of claims XXXIII

Leases and Sales—

1. As to appropriations 336

Leases—

1. Assets where land lies 235

Leasing and Resale—

1. Of land purchased for non-payment of taxes 334

Leave of Absence—

1. Extension of 345

Legacies—

1. Left by General Wool 206

Legacy Tax—

1. As to contracts and informers 205
 2. Disposition of moneys collected as 207
 3. None due from executor of Wool, when contract with Sanborn was made. 209
 4. Remitted to Secretary by Sanborn 206

Legacy Taxes—

1. Which had accrued prior to repeal 207

Legal Allowance—

1. As to foreign ministers 271

*Legal Allowances—(See Contingent Expenses.)**Legal Authority—*

1. Wool's taxes collected by Government under color of 210

Legal Certificates—

1. Holders of, notified as to contest 323

Legality—

1. In the issues of money, as to XXI

Legal Proceedings—

1. As to set-off by accounting officers 209

Legal Representative—

1. As to Treasury drafts 231

Legal Rights—

1. Consideration of, by executive officers XXXVIII
 2. Of parties examined in Treasury Department XXXIV

Legal Science—

1. Pertaining to the great Departments of the Government XXXIII

Legal Title—

1. To a registered bond, transfer of 286
 2. To negotiable instrument, manner of transfer 292

Legal Vouchers—

1. Comptrollers to determine what are xxx

Legatees—

1. Rights of 273
 2. Under the will, as to registered bonds 191

Legislation—

1. All rightful subjects of, not inconsistent with the Constitution and laws of the United States 148
 2. Rightful subjects of 150
 3. Unnecessary, referred to 41

	Page.
<i>Legislature—</i>	
1. Meaning of action of.....	151
2. Of New Mexico, authority given to, by Congress	150
3. Territorial, invested with general authority	148
4. Territorial power of	148
<i>Legislative Assembly—</i>	
1. Statute giving power to	151
<i>Legislative authority—</i>	
1. And power over officers	119
<i>Legislative Intent—</i>	
1. As to	101
2. As to repeal by implication	331
<i>Legislative Intent—(See Intention.)</i>	
<i>Legislative Power—</i>	
1. Adjustment and settlement of accounts not an exercise of.....	274
2. As to.....	360
3. Cannot be exercised as between private citizens	10
4. Limitation on	272
<i>Legislative Supervision—</i>	
1. As to appropriations	339
<i>Leslie, Geo.—</i>	
1. Party in Gibson's case	286
<i>Letter—</i>	
1. Of Acting Commissioner of Internal Revenue as to direct taxes.....	341
2. Of Acting Secretary of the Treasury as to refund of taxes	316
3. Of chief justice of Territory of New Mexico to Attorney-General Brewster referred to.....	149
4. Of clerk as to substitute.....	346
5. Of Commissioner of General Land Office as to sale of land	365
6. Of Commissioner of Internal Revenue as to proceeds of sale	335
7. Of Commissioner of Internal Revenue in Sanborn's case	207
8. Of disbursing agent of National Board of Health as to appropriation quoted from	222
9. Of disbursing agent of National Board of Health as to disposition of appropriation of \$100,000	226
10. Of Edward McPherson, Clerk of House, as to extra pay for preparing Digest.....	362
11. Of First Comptroller as to consular accounts	349
12. Of First Comptroller as to per diem fee.....	269
13. Of First Comptroller as to substituted attorneys.....	315
14. Of First Comptroller, transmitting report of Board of Audit as to illness and burial of late President Garfield	375
15. Of Hilary A. Herbert, as to pay of deceased contestant.....	325
16. Of H. S. Huidekoper, quoted from.....	156
17. Of marshal of District of Columbia as to Lottery cases.....	261
18. Of M. P. Kennard as to indorsement of pension checks.....	185
19. Of Secretary of Interior as to sale of old material.....	37
20. Of Secretary of State as to consular accounts.....	349
21. Of Secretary of the Treasury as to colonization of people of African descent.....	332
22. Of Secretary of the Treasury as to consular accounts	349
23. Of supervising surgeon of Marine Hospital Service as to sales of old material.....	37
24. Of Third Auditor as to disbarred attorneys.....	314
25. Of United States Treasurer as to indorsements.....	191

Letters—

1. Of administration, conflicting grant of..... 180
2. Testamentary, or of administration 181

Leyonhupud, C.—

1. Certificate and letter of, as to Swedish marriage contract..... 172

Liabilities—

1. For which appropriations are made 220
2. Of attorneys, &c., as to xxvii
3. Payment of, as to public health 221

Liability—

1. As to, of United States..... 108
2. Attached to ministerial offices..... 73
3. Congress alone can create a public..... 108
4. Of Government as to registered bonds..... 190
5. Of Government as upon a *quantum valebat*..... 106
6. Of Government to refund money to purchasers of public lands erroneously sold..... xix
7. Of Government to refund taxes..... xix
8. Of officers to the Government..... xix
9. Of sureties of a contractor for carrying mails..... 1
10. Of United States to pay for fractional parts of greenbacks, silver certificates, and fractional currency..... 201
11. To third parties having latent equities..... 193

Liberia—

1. As to colonization or emigration..... 334

Library of Congress—

1. Authority to exchange books for..... 54

*Lien—(See Claims, Debts, Practice, Property, Suits.)**Light-house Keeper—*

1. As to..... 308

Like Service—

1. Compensations for 1883 adjusted on basis of..... 216

Lilley, W.—

1. Attorney for Taylor in Dorsey's Appeal case..... 3

Limitation—

1. Effect of, on general power..... 152
2. For fees and mileage..... 163
3. Prescribed in act of June 20, 1874..... 48

Limitations—

1. Of use of appropriations for Board of Health 224

Limited Appropriations—

1. As to xix

Liquidated Claims—

1. As to..... 21

Liquidated Damages—

1. As to..... 10

List—

1. Of amounts certified to be paid on account of the illness and burial of late President Garfield 387

List of Claims and Claimants—

1. As to illness and burial of late President Garfield 392

List of Employés—

1. And compensation as to illness and burial of late President Garfield 393

Lithocautic Illustrations—

1. Authorized by law, referred to 111

	Page.
<i>Lithographing—</i>	
1. And engraving plates for public documents	92
<i>Litigation—</i>	
1. There must be an end to	xxxI
<i>Live Stock—</i>	
1. Sales of	55
<i>Loan Acts—</i>	
1. As to	287
assignment of bonds and coupons	23, 35
3. Requirements of, as to registered bonds	203
<i>Loan Books—</i>	
1. In Register's office, as to transfer of registered bonds	288
<i>Local Assets—</i>	
1. What constitute	183
<i>Lord Cornwallis—</i>	
1. Centennial Anniversary of surrender of	141
<i>Loss and Damage—</i>	
1. As to carrying mails	2
<i>Loss—</i>	
1. As to, of vouchers, records, and papers by Government officers	xxxviii
2. Caused by fault of creditor	12
3. Of negotiable paper	295
<i>Losses—</i>	
1. By war, reimbursing loyal citizens for their	338
<i>Lost Greenback Case</i>	166
<i>Lost Greenback—</i>	
1. Disposition of, by Treasury Department	169
<i>Lost Registered Bonds—</i>	
1. As to	286
2. May be paid on proper evidence	204
<i>Lottery Cases—</i>	
1. In District of Columbia	261
<i>Lottery Tickets—</i>	
1. Offense of keeping, for sale	260
<i>Love, James—</i>	
1. Party in Gibson's case	294
<i>Loyal Citizens—</i>	
1. Reimbursement of	334
2. Sales of lands to	335
<i>Lunatics—(See Insanity)—</i>	
1. Appointment of committee as to	184
2. Care of	184
M.	
<i>Maximum—</i>	
1. Of Utah district attorney's compensation	121
<i>McGrath, Governor—</i>	
1. Summons of, as to reconstruction	343
<i>McLellan, Hon. Robert—</i>	
1. Asks as to delegation of duty of signing	69
<i>McPherson, Edward—</i>	
1. Clerk of House, letter of, as to extra pay for preparing Digest	362
<i>Magistrate—</i>	
1. Can have neither assistant nor deputy	76
<i>Mail Contracts—</i>	
1. Assignment and transfer of, null and void	6
2. As to subletting of	6

	Page.
Mails—	
1. As to contractors for carrying the.....	xxi
2. As to transferring, subletting, or assigning contract for carrying.....	6
3. Authority of Postmaster-General as to contracts for carrying	1
4. Contract for carrying	1
5. Contract for carrying, may be sublet or transferred.....	15
6. Disposition of compensation for carrying	122
7. Proposals for carrying	309
Mail Lettings—	
1. As to advertisements	311
Maker—	
1. Signature of, as to indorsement	189
Malakof Bitters Case.....	129
Malakof Bitters—	
1. Claim for refund of stamps rejected	137
2. Translation of handbill advertisement of.....	129
Malicious Act—	
1. Civil liability in damages for	xxxvii
Mandamus—	
1. Application for writ of	116
2. As to control over accounting officers	xxxvi
3. As to judicial proceedings against accounting officers.....	xxxvi
4. Views of authorities as to exercise of judicial power by	xl
5. When issued against an officer.....	78
6. Who may have a.....	xxxvi
7. Will not lie against the Comptroller	78
Manual—	
1. Compilation of Internal Revenue	243
Manufacturer—	
1. Fees paid by	252
Manuscript Files—	
1. In Treasury Department, as to	xv
Marine Hospitals—	
1. Authority to sell or lease	51
2. Construction of	155
3. Established by act July 16, 1798	53
4. Selling or leasing.....	49
Marine Hospital Fund—	
1. As to proceeds of sale of old material	49
2. Authority of Secretary of the Treasury over	54
3. Sales of unserviceable property purchased from.....	37
Marital Right—	
1. To property arising under post-nuptial contract.....	175
Marital Rights—	
1. As to transfer of property	170
2. Of husband and wife	170
3. Of husband in and to personal estate of wife	174
Marriage—	
1. Contract before and after.....	175
2. How celebrated	144
Marriage Contract—	
1. Force of	170
Marriage Contracts—	
1. Laws and incidents relating to	178

	Page.
<i>Marshal—</i>	
1. A, of the United States, holding over after expiration of his term of office, not entitled to pay	111
2. Appointment of	113
3. Authority of, after expiration of office.....	119
4. In Durkee's case allowed credit for the sum claimed	166
5. Of District of Columbia, letter of, as to lottery cases.....	261
6. Office of.....	113
7. Temporary appointment of, to be made by circuit justice, when vacancy occurs	112
<i>Marshal's Accounts—</i>	
1. Adjustment of.....	164
2. Limitation of allowances in	164
<i>Marshals—</i>	
1. All, except those in the Territories, are appointed for four years only ..	112
2. Compensation to	163
3. Districts assigned to	158
4. Of Territories hold their offices for four years, and until their successors are appointed and qualified.....	112
5. Reimbursement of actual expenses of.....	164
<i>Marshals, U. S.—</i>	
1. Compensation of	90
2. Duty of, as to warrants issued by commissioners.....	59
<i>Marshal's Mileage case</i>	55
<i>Material—</i>	
1. Sales of old	36
<i>Materials—</i>	
1. For distillation, excessive use of	315
<i>Meaning of Action—</i>	
1. Of legislature	151
<i>Meaning of Words—</i>	
1. As to	355
<i>Mechanic—</i>	
1. As to	247
<i>Medical Department—</i>	
1. Of the Army in the field	34
<i>Medical Officers—</i>	
1. Detail of, to foreign ports.....	226
<i>Medical Services—</i>	
1. Schedule A, as to illness and burial of late President Garfield	320
<i>Medicinal Preparation—</i>	
1. As to refunding tax on.....	129
2. Liability to stamp tax	129
<i>Medicines—</i>	
1. Liability of manufacturers of	133
<i>Member of Congress—</i>	
1. A professional retainer is not an office. The Constitution, article 1, section 6, does not prohibit a person so employed from being a.....	355
2. Unseating a	321
<i>Members of Congress—</i>	
1. (See Crowley's case, in Index.)	
<i>Memorandum—</i>	
1. In appropriation act as to False Description case	167
<i>Merchant Vessels—</i>	
1. Regulations as to, in case of epidemic disease.....	226



	Page.
<i>Merriman, A. L.—</i>	
1. Attorney for Halstead in Halstead's case	232
<i>Messenger—</i>	
1. As to	247
2. Of the Senate, as to	280
<i>Messengers—</i>	
1. Substitutes for	345
<i>Mileage—</i>	
1. As to contested seat in Congress	328
2. Of United States marshals	90
3. Traveling expenses in lieu of	163
<i>Military Authority—</i>	
1. During reconstruction	343
<i>Military Law—</i>	
1. As to exercise of	344
<i>Military Officer—</i>	
1. Power of President to revoke dismissal of	XXXIII
<i>Military Reconstruction—</i>	
1. As to	344
<i>Militia—</i>	
1. As to President calling forth, to suppress insurrection, &c.	77
<i>Ministerial Acts—</i>	
1. As to accounting officers	62
<i>Ministerial Office—</i>	
1. Definition of	77
2. When granted to be executed in person, cannot be delegated	83
<i>Ministerial Officers—</i>	
1. Expenses incurred by	155
<i>Minister or Consul—</i>	
1. As to acknowledgments	190
<i>Minister—</i>	
1. To Liberia, Garnet's Case	270
<i>Miscellaneous Receipts—</i>	
1. As to sale of old material	41, 54
2. On account of proceeds of Government property	57
<i>Misnomer—</i>	
1. Power of	307
<i>Missions—(See Foreign Intercourse.)</i>	
<i>Mistake—</i>	
1. In judgment	135
<i>Mistakes—</i>	
1. As to disputed titles to land	XLI
<i>Mixture—</i>	
1. As to	131
<i>Mode—</i>	
1. Of assigning registered bonds	35
2. Of depositing and paying moieties from amounts of legacy tax collected ..	207
3. Of distributing the proceeds, as to administration	238
4. Of making contracts with informers	205
5. Of passing title to bonds and certificate of stocks	203
6. Of paying claims against United States	302
7. Of payment for fractional part of bond	205
8. Of proceeding to secure payment of claims	16
9. Of repealing statute	260
10. Of revoking draft before actual payment	XXVIII

	Page.
<i>Mode</i> —Continued.	
11. Of sale of old material.....	54
12. Of securing a rehearing on rejected claims.....	XXVIII
<i>Modes</i> —	
1. Of making payment of claims.....	297
<i>Modification</i> —	
1. Of law by law.....	363
<i>Moieties</i> —	
1. As to action for recovery of payment of.....	206
2. As to lotteries.....	262
3. Paid to informers for detection of violations of internal-revenue law....	212
4. Payment of informers'.....	210
5. To informers, payment of, prohibited.....	205
6. When Government estopped from denying legality of payment of.....	205
<i>Moiety System</i> —	
1. In revenue cases, abolished.....	212
<i>Molasses</i> —	
1. As to deficiency tax.....	316
<i>Money</i> —	
1. Advanced to pension agents as disbursing officers.....	125
2. As to withdrawal of, from the Treasury.....	XL
3. Authority to collect, from Government.....	231
4. Belonging to the United States, discovering and collecting.....	205
5. Borrowing, from brokers.....	17
6. Control and disposition of, by Treasury Department.....	239
7. In the Treasury as to direct-tax case.....	337
8. Means of receiving, within statute.....	25
9. Paid by disbursing officers and agents.....	28
10. Paid by person not authorized may be recovered back by United States.	211
11. Payment of, without a draft.....	241
12. To credit of disbursing officer.....	18
<i>Money Demand</i> —	
1. Claim designed to apply to every.....	19
<i>Money Due</i> —	
1. Rights therein.....	257
<i>Moneys</i> —	
1. Advanced to disbursing officers.....	297
2. Authority to receive and receipt for.....	191
3. Disbursed by Commissioners of the District of Columbia.....	XIX
4. Received by officer for use of United States.....	37
<i>Money Values</i> —	
1. As to comparison of jurisdiction of executive officers and of courts.....	XVII
<i>Montana</i> —	
1. Number of terms of court in, each year.....	150
<i>Monument</i> —	
1. At Yorktown, "adorned with emblems of the alliance between the United States and His Most Christian Majesty".....	141
2. At Yorktown, erection of a.....	141
3. At Yorktown, inscribed with a narrative of the surrender of Earl Cornwallis.....	141
<i>Morgan, Asher R.</i> —	
1. Party in Sauborn's Case.....	206
<i>Morgan, R. C.</i> —	
1. As to accounts of.....	350
<i>Motion</i> —	
1. To set aside, modify, or correct.....	XXXII

	Page.
<i>Moyers, Gilbert—</i>	
1. Party in Halstead's Case.....	231
<i>Municipal Corporations—</i>	
1. As to.....	360
<i>Mutilated Note—</i>	
1. Disposition of, when found	166
<i>Mutilated Notes—</i>	
1. Replacing.....	166
N.	
<i>Nation—</i>	
1. Preference as between citizens and persons of other countries	237
<i>National Bank Notes—</i>	
1. Redeemed as others, when bank has failed	168
<i>National Board of Health—</i>	
1. Appropriation act quoted from, as to.....	222
2. Appropriation for	221
3. Authority and object of	221
4. Authority of, as to State and local boards and quarantine stations	223
5. Estimates of, for appropriations	226
6. Origin of.....	221
7. Powers given to	223
8. Report of, as to health regulations.....	226
<i>National Courts—</i>	
1. As to the local common law administered in	XXII
<i>National Government—</i>	
1. As to the three powers of.....	360
<i>Nationality—</i>	
1. Of parties, as to indorsements on United States securities	173
2. Of wife	173
<i>National Jurisprudence—</i>	
1. As to the system of	XXII
<i>Naval Officers—</i>	
1. Districts assigned to.....	158
<i>Navy—</i>	
1. As to acts of, in suppressing the rebellion	XXXVIII
2. As to property destroyed or appropriated by	XXXVIII
<i>Navy Regulations—</i>	
1. Regarding allotments of pay	27
<i>Necessity—</i>	
1. Absence of, as to construction of appropriation act	331
2. Absence of, as to determining whether an appropriation is intended....	336
<i>Negatives—</i>	
1. Rules of construction as to	162
<i>Negotiable Securities—</i>	
1. Law applicable to.....	170
<i>Negotiability—</i>	
1. Definition of	292
<i>Neighborhood—</i>	
1. As to post-offices.....	158
<i>Neutrality Act—</i>	
1. As to.....	354
<i>New Bond—</i>	
1. As to negotiable instruments.....	272
<i>New Provisions—</i>	
1. As to repeal	263

	Page.
<i>Newspapers—</i>	
1. Clerk of House may select, in which to advertise	310
2. Compensation for advertising in	309
<i>New Trial—</i>	
1. As to a rehearing on rejected claims	xxviii
<i>Next of Kin—</i>	
1. As to disposition of bonds	195
<i>Non-payment of Taxes—</i>	
1. Sale of lands for	334
<i>Non-Usage—</i>	
1. Effect of, as to repeal	331
<i>Notice—</i>	
1. As to	289
2. As to force of	xxxix
3. As to indorsements	188
4. As to registered bonds	190
5. By advertising as to contract for carrying mails	311
6. Given by subcontractor as to carrying mails	1
7. Of filing of subcontracts for carrying mails	7
8. Purchasers charged with, as to rights of prior parties	295
9. Stipulated between contractor and subcontractor	5
O.	
<i>Oath—(See Revised Statutes.)</i>	
1. As to	242
2. As to, of Member of House	323
3. As to substitutes	346
4. Authority to administer	219
5. Date of, governing salary	214
6. Of claimant as to	xxx
<i>Oath of Office—</i>	
1. Copy of	346
<i>Obligation—</i>	
1. Incurred by Commissioners of District of Columbia	195
2. Of an official bond	115
<i>Occupancy—</i>	
1. Difference between right to a seat and its	326
<i>Offenses—</i>	
1. In relation to policy lotteries	262
2. Jurisdiction of federal courts over common law	xxii
<i>Office—</i>	
1. A professional retainer is not an. The Constitution, Article 1, section 6, does not prohibit a member of Congress from being so employed	355
2. Illegal holding of	115
3. Is a member elect one holding	355
4. Judicial or ministerial	74
5. Of chief supervisor, act creating	153, 154
<i>Office of Deputy Comptroller—</i>	
1. Created by statute	71
<i>Office Rent—</i>	
1. As to	299
<i>Officer—(See Agent, Clerk.)</i>	
1. A clerk is an	347
2. A disbursing clerk is an	159
3. Assignment by, of future salary void	14

	Page.
<i>Officer</i> —(See <i>Agent, Clerk</i>)—Continued.	
4. By whom appointed.....	307
5. Charged with a duty, authority of.....	303
6. Detailed to investigate frauds.....	249
7. Diplomatic and consular, as to.....	349
8. Distinction between agent and.....	159
9. Duty imposed on, by subcontract for carrying mails.....	1
10. Is a Representative in Congress an.....	355
11. Meaning of term.....	307
12. Member of Congress, Acting Judge Advocate.....	447
13. Or person, meaning of.....	358
14. Performing the duties of another, not entitled to extra compensation...	284
15. To perform duties of First Comptroller.....	283
16. Under the Government, is a Member of Congress an.....	442
17. Who is an.....	305
<i>Officer De Facto</i> —	
1. Cannot recover fees unless he be an officer <i>de jure</i>	117
<i>Officers</i> —(See <i>Pension Agents</i> .)	
1. And agents who have no districts.....	158
2. And employés, as to compensation at.....	218
3. And employés, salaries of.....	214
4. Assignment by, of salary or compensation.....	xx
5. Authority of public.....	93
6. Effect of approval of, as to allowance of claims.....	xxx
7. How, and by whom appointed.....	346
8. Judicial, as to.....	150
9. Liability of, to the Government.....	xix
10. Of the Government, certificate of the Speaker of the House conclusive upon.....	330
11. Of the Post-Office Department over the Sixth Auditor.....	1
12. Heads of Departments and Bureaus.....	76
13. Payment of salaries of.....	13
14. Pay of.....	27
15. Powers and duties of various classes of.....	72
16. Salaries of some officers "from the time they enter upon the performance of their duties." (See 4 Opinions Atty-Genl., 123).....	215
17. Sometimes incur civil liability in damages.....	xxxvii
18. Special disbursing agents are not.....	159
<i>Officers and Persons</i> —	
1. In the public service, as to construction.....	359
<i>Officers and Tribunals</i> —	
1. Authorized to act on claims, as to.....	xxvi
<i>Offices</i> —	
1. Abolished by act August 5, 1882.....	217
2. Abolishment of.....	215
3. Change in salary of.....	215
4. Not regarded as grants or contracts, but rather as trusts or agencies....	83
5. Some new, created,.....	215
6. Two distinct, compatible.....	305
<i>Official Corruption</i> —	
1. As to.....	xxxvii
<i>Official Discretion</i> —	
1. Not generally subject to review.....	146
<i>Official Fees</i> —	
1. Received by consular officer.....	26

	Page.
<i>Official Functions—</i>	
1. Of First Comptroller cannot be assigned.....	26
<i>Oil—</i>	
1. Coal and other, inspectors.....	252
<i>Omissions—</i>	
1. In a statute, as to.....	315
<i>Omission—</i>	
1. To use ordinary form of expression for an appropriation, effect of.....	336
<i>One Hundred and Eighth Call—</i>	
1. As to registered bonds.....	227
<i>One Hundred Thousand Dollars—</i>	
1. Appropriated to erect monument at Yorktown.....	141
<i>Opinion—(See Attorney-General.)</i>	
1. By Attorney-General Butler, vol. 2, pp. 625 and 650, referred to.....	147
2. By Attorney-General Butler, vol. 3, pp. 1, 15, 18, and 148, referred to....	147
3. By Attorney-General Legaré, vol. 4, p. 80, referred to.....	147
4. By Attorney-General Williams, vol. 14, p. 419.....	147
5. By Attorney-General Wirt, vol. 1, pp. 522, 624, 699, referred to.....	147
6. By Attorney-General as to local assets, quoted.....	240
7. By Attorney-General as to postmasters as disbursing agents.....	156
8. By Attorney-General, vol. 7, p. 303, referred to.....	112
9. By Attorney-General, vol. 9, p. 36, quoted from.....	xvi
10. By Attorney-General, vol. 9, p. 188, quoted.....	17
11. By Attorney-General, vol. 10, p. 243, maxim cited.....	108
12. By Attorney-General, vol. 11, pp. 5 and 6, quoted from.....	xvi, xvii
13. By Attorney-General, vol. 11, p. 287, quoted.....	116
14. By Attorney-General, vol. 14, p. 263, quoted.....	115
15. By Attorney-General, vol. 15, p. 90, quoted.....	22
16. By Attorney-General, vol. 16, p. 568, quoted.....	116
17. By First Comptroller, asking in advance for.....	xxi
18. By First Comptroller as to extra compensation to Representative in Congress.....	356
19. By First Comptroller in Agency-Delegation case.....	63
20. By First Comptroller in Appropriation-Extension case.....	215
21. By First Comptroller in Barnett's case.....	200
22. By First Comptroller in Board-of-Health case.....	223
23. By First Comptroller in Claims-Assignment case.....	14
24. By First Comptroller in Colbath's case.....	261
25. By First Comptroller in Commissioners Per-Diem-case.....	269
26. By First Comptroller in Contestant's Widow's case.....	329
27. By First Comptroller in Crowley's case.....	357
28. By First Comptroller in Direct-Tax case.....	334
29. Of First Comptroller in District-Contract case.....	198
30. By First Comptroller in Epidemic-Disease case.....	227
31. By First Comptroller in False-Description case.....	267
32. By First Comptroller in Gibson's case.....	228
33. By First Comptroller in Halstead's case.....	234
34. By First Comptroller in Huidekoper's case (second).....	157
35. By First Comptroller in Informer's case.....	262
36. By First Comptroller in Jordan's case.....	276
37. By First Comptroller in Kennard's case.....	127
38. By First Comptroller in Lost-Greenback case.....	167
39. By First Comptroller in Osage-Land case.....	366
40. By First Comptroller in Otto's case.....	298
41. By First Comptroller in Proceeds-of-Sales case.....	40

	Page.
<i>Opinion—(See Attorney-General)—Continued.</i>	
42. By First Comptroller in Rheem's case.....	307
43. By First Comptroller in Saint Elizabeth case.....	57
44. By First Comptroller in Shelley's case.....	323
45. By First Comptroller in Smith's case.....	363
46. By First Comptroller in Substituted Attorneys case.....	314
47. By First Comptroller in Substitute case referred to	346
48. By First Comptroller in Tayloe's case	192
49. By First Comptroller in Territorial-Court case	149
50. In Indian-Land case re-examined and affirmed.....	365
51. Of Attorney-General may be required by the head of any Department..	xvi
<i>Opinions—(See Decisions.)</i>	
<i>Opinions and Decisions—</i>	
1. By the First Comptroller, as to.....	xxxiii
<i>Opinions—</i>	
1. By the Attorney-General, as to	xv
<i>Oral Argument—</i>	
1. As to prosecuting claims.....	xxviii
<i>Order—</i>	
1. For pay.....	17
2. Of court, validity of, cannot be questioned by executive officers.....	232
3. Of Major-General Gillmore as to reconstruction.....	343
4. Of pensioner as to payment of check.....	187
5. Of Post-Office Department making new contract.....	4
6. Of Post-Office Department suspending pay of contractor.....	4
7. Of Secretary as to refund of taxes.....	280
8. Of Secretary of the Treasury authorizing Joseph Addison Thomson to perform duties of Deputy First Comptroller.....	285
9. Suspending or disbaring an attorney, as to.....	313
<i>Orders—</i>	
1. By Second Assistant Postmaster-General as to contracts for carrying mails.....	2
2. For receiving payment of claims when void.....	16
3. Of courts, as to.....	xxxii
4. Of Post-Office Department, Sixth Auditor not subject to.....	4
<i>Orders and Decrees—</i>	
1. By courts, revocation of.....	xxxii
<i>Ordinance Stores—</i>	
1. As to sale of old material	54
<i>Ordinances—</i>	
1. Of the corporation of Georgetown, January 9, 1864, interest checks.....	426
2. Of the corporation of Georgetown, September 24, 1864, interest checks.....	426
3. Of the corporation of Washington, August 19, 1828, interest checks.....	426
4. Of the corporation of Washington, October 25, 1843, interest checks....	426
5. Of the corporation of Washington, April 14, 1847, interest checks.....	426
6. Of the corporation of Georgetown, May 12, 1871, interest checks.....	426
<i>Organic Act—</i>	
1. Quoted, as to taxes.....	261
<i>Organic Acts—</i>	
1. Of Territories.....	153
<i>Organisation—</i>	
1. Of the officer of the Register of the Treasury—Appendix.....	399
2. Of the office of the Treasurer of the United States—Appendix.....	399
3. Of the Treasury.....	63

	Page
<i>Original Attorney—</i>	
1. Rights of, after revocation of disbarment.....	314
<i>Original Contractor—(See Contractor.)</i>	
<i>Original Jurisdiction—</i>	
1. As to tribunals of.....	XXVI
2. Of auditing officers defined by statute	XXVI
3. Of disbursing officers as to payment of claims.....	XXVII
<i>Original Owner—</i>	
1. As to registered bonds.....	289
<i>Original Parties—</i>	
1. Signature of, as to indorsement.....	189
<i>Original Running Time—(See Schedule Time.)</i>	
<i>Original Statutes—</i>	
1. Text, purpose, and history of.....	36
<i>Osage Indians—</i>	
1. As to	366
<i>Osage-Land Case.....</i>	365
<i>Osage Treaty—</i>	
1. As to	371
2. January 21, 1867, civilization fund.....	367
3. January 21, 1867, Indians, lands.....	369, 371
<i>Osage Trusts—</i>	
1. As to	366
<i>Otto's Case</i>	296
<i>Otto, William T.—</i>	
1. Party in Otto's case	297
<i>Ouster—</i>	
1. Effect of judicial, as to vacations	346
<i>Owner—</i>	
1. As to equitable.....	XLI
2. Of property taken as abandoned or captured, rights of.....	XXXVIII
3. Rights of, as to direct-tax sales.....	339
<i>Owner—(See Manufacturer.)</i>	
<i>Ownership—</i>	
1. Controverted questions as to.....	XXXIV
2. From possession, as to indorsements.....	182
3. Of Government bonds, as to disputed.....	XXXIV
P.	
<i>Paper Evidence—</i>	
1. Drafts as	238
2. Of right of action	169
<i>Paper—</i>	
1. From internal-revenue office filed in Atherton & Co.'s case.....	317
<i>Papers—</i>	
1. As to.....	242
2. As to relief for loss of public.....	XXXVIII
<i>Parliamentary Law—</i>	
1. Works on	XXIV
<i>Parol Evidence—</i>	
1. Admissibility of	267
<i>Parties—</i>	
1. Assent of.....	332
2. As to identification of.....	24
3. Conclusion of rights of	181

Page.

Parties—Continued.

- 4. Determination of conflicting rights of..... xxxvii
- 5. Entitled to prosecute as to..... xxviii
- 6. Entitled to receive payment of claims..... xxviii

Parties in Interest—

- 1. Rights of, as to disposition of bonds..... 196

Part Interest—

- 1. In bonds, assignment of 202

Party—

- 1. A, who acts for the Government without authority of law cannot create a valid claim to compensation..... 111

Patentee—

- 1. As to titles to land xli

Patents—

- 1. Decision of Supreme Court regarding 77
- 2. For land, as to interference by courts with issue of..... xl
- 3. To public lands in Kansas canceled 371

Pay—

- 1. Due Army officers, claims for..... 13
- 2. Of subcontractor, retained by Sixth Auditor..... 7

Pay and Expenses—

- 1. Of members of National Board of Health 227

Pay Draft—

- 1. Copy of 123

Pay Drafts—

- 1. For carrying mails 123

Payee—

- 1. In a bond, execution of blank assignment by..... 204
- 2. In a promissory note..... 177
- 3. Indorsement of 233
- 4. Indorsement of, as to pensions..... 188
- 5. In warrant, rights of legal representatives of..... 231

Payees—

- 1. As to registered bonds..... 288

Paymaster—

- 1. As to claim of..... xxxvii

Paymasters—

- 1. Checks drawn by..... 65

Payment—(See Balance, Salary, Set-off.)

- 1. And prices fixed for advertising, by whom..... 311
- 2. As to, for carrying mails 1
- 3. As to, when interfered with by courts..... xxviii
- 4. By installments for partially-completed contracts..... 96
- 5. For contracts..... 96
- 6. Of any claim, authorities for receiving..... 13
- 7. Of balances due claimants, as to..... xvii
- 8. Of bonds after maturity..... 194
- 9. Of bonds, provisions for..... 200
- 10. Of bonds to foreign guardian..... 171
- 11. Of bond which has been destroyed, wholly or in part..... 204
- 12. Of called bonds, as to..... xxvii
- 13. Of checks..... 185
- 14. Of claim..... 220
- 15. Of claim, final action authorizing..... xxviii
- 16. Of claims, mode of proceeding to secure..... 16

	Page.
Payment—Continued.	
17. Of claim, process by which it is secured.....	xxviii
18. Of claim to wrong claimant.....	xxxix
19. Of claims under powers of attorney.....	13
20. Of claims, warrant countersigned by First Comptroller.....	16
21. Of claims, warrant issued for, by Secretary of Treasury.....	16
22. Of claims which existed prior to April 13, 1861.....	23
23. Of draft as to rival claimants.....	xxxix
24. Of drafts estops all persons from denying its validity.....	234
25. Of expenses incurred by ministerial officers.....	155
26. Of expenses of sales of land.....	365
27. Of Government bonds.....	201
28. Of interest checks and bonds.....	182
29. Of interest coupons, as to.....	xxvii
30. Of Journal Clerk of House of Representatives.....	362
31. Of liabilities, as to.....	xix
32. Of lost registered bonds.....	286
33. Of matured bonds, practice regarding.....	200
34. Of money, as to validity of Treasury warrants for the.....	xx
35. Of money by public officer without authority.....	206
36. Of money by United States.....	237
37. Of money on contingencies.....	331
38. Of money out of Treasury.....	231
39. Of negotiable public securities.....	182
40. Of negotiable public securities to foreign guardian.....	171
41. Of pension checks.....	185
42. Of public debt to foreign guardian of alien authorized.....	182
43. Of salaries and other claims.....	13
44. Of salary.....	19
45. Of successor, when to begin.....	323
46. Of Treasury drafts.....	189
47. Of Treasury drafts to legal representatives.....	231
48. Of warrant made by Treasurer.....	16
49. To assignee.....	xlii
50. To <i>de facto</i> officers.....	321
51. To holder to equitable title, effect of, on holder of, legal title.....	xlii
52. To informers as to lotteries.....	263
53. To representatives of deceased creditors of the Government.....	238
54. To rightful holder.....	188
55. To Sanborn, United States never assented to.....	210
Payments—	
1. Erroneously made, as to.....	xxxii
2. For information and detection.....	244
3. From money which has not been deposited.....	368
4. In advance of services prohibited.....	128
5. Made by Government, estop further demands upon United States.....	14
6. To claimants as to illness and burial of late President Garfield.....	377
7. To officers and employés.....	214
Pay-Rolls—	
1. As to.....	xxvii
2. As vouchers.....	29
3. Powers of attorney, as to receipting.....	14
4. Who may receipt.....	28
Penal Offense—	
1. It is a, for an officer of United States to act as agent or attorney for prosecuting claim against United States.....	19

Penalties—

1. As to enforcement of, from private parties..... 1

Penalty—

1. Stipulation in subcontract for carrying mails..... 8
2. Withheld for benefit of contractor..... 1

Pension Agent—

1. Duty of 187

Pension Agents—

1. Districts assigned to..... 158
2. Money advanced to and paid by 185
3. Terms of 115

Pension—

1. Assignment of..... 34

Pension Checks—

1. Having several indorsements..... 185
2. Payment of, by public depositaries..... 185
3. Samples of indorsements of..... 185

Pensioners—

1. Vouchers executed by 185

Pensions—

1. Paid by disbursing officers..... 185

People of African Descent—

1. Colonization of..... 332

Per Diem Case 268*Per Diem Charge—*

1. As to commissioners 269

Per Diem Compensation—

1. Provisions relating to..... 214

Per Diem Fee—

1. Of circuit court commissioners..... 268

Per Diem Salaries—

1. Changed to annual salaries by act August 5, 1882 217

Performance—

1. Of contract..... 176

Perkins, Charles T.—

1. Party in Dorsey's Appeal case..... 3

Permanent Annual Appropriation—

1. As to XIX
2. As to expression..... 337

Permanent Appropriation—

1. As to..... 337

Permanent Legislation—

1. Letter of Secretary of the Treasury as to..... 303

Permanent Specific Appropriations—

1. As to use of..... XIX
2. As to..... 220, 297, 337

Permanent Specific Appropriation—

1. Construction of statute as to..... 331

Permanent Session—

1. Auditing officers are in XXVI

Person—

1. As to meaning of..... 359
2. As to members of Congress and officers 359
3. Held to service or labor..... 20
4. In a branch of the public service..... 308
5. Meaning of, in Revised Statutes..... 361

	Page.
<i>Personal Property—</i>	
1. As to claims and drafts	233
<i>Personal Services—</i>	
1. As to illness and burial of late President Garfield.....	374
<i>Peterson, B. H.—</i>	
1. Party in Walsh's case.....	124
<i>Petition in Error.....</i>	xxvii
<i>Physicians—</i>	
1. Services of	221
<i>Place—</i>	
1. Of holding court, control of legislature over	149
<i>Place of Location—</i>	
1. As to disbursements for erection of public buildings.....	156
<i>Plantations—</i>	
1. Tabular statement as to sale of	335
<i>Pleading—</i>	
1. As to.....	xxviii
<i>Plenary Authority—</i>	
1. As to.....	149
<i>Police Court—</i>	
1. As to informers.....	260
<i>Policy—</i>	
1. As to change of.....	343
2. Of saving the Union with slavery.....	337
<i>Policy Lotteries—(See Offenses.)</i>	
<i>Policy Shops—(See Offenses.)</i>	
<i>Political Question—</i>	
1. Reversal of Departmental decision containing.....	181
<i>Political Rights—</i>	
1. As to.....	342
<i>Porter, A. G.—</i>	
1. First Comptroller, advice of, regarding exchange of old material for new.....	53
<i>Possession—</i>	
1. Effect of, as to payment of drafts	240
<i>Postage—(See Contingent Expenses.)</i>	
<i>Postal Laws and Regulations—</i>	
1. Prohibits assignments of transfers of mail contracts.....	6
<i>Postal Regulations—</i>	
1. For 1879, p. 146, sec. 623, prohibitions against assignments.....	6
2. For 1879, p. 146, sec. 624, subletting mail contracts	6
3. For 1879, secs. 666–669, deductions from contracts	9
4. Of 1879, secs. 29, 59, 1140, 1141, and 1142, carrying mails.....	4
5. Sections 625 and 626, mail contracts.....	5
<i>Postal Service—</i>	
1. As to decisions affecting	xxi
<i>Post-Dated Receipts—</i>	
1. Are unauthorized.....	29
2. Required by brokers.....	17
<i>Postmaster—</i>	
1. Statutory residence of	153
<i>Postmaster-General—</i>	
1. As to appeals from Sixth Auditor.....	5
2. As to publishing proposals for carrying the mails	309
3. Authority of, as to advertising.....	310

Page.

Postmaster-General—Continued.

4. Authority of, as to contracts for carrying mails.....	1
5. Authority of, over contracts for carrying mails.....	6
6. Certificate of Second Assistant, as to performance of contract for carrying mails.....	3
7. Consent of, in writing, as to subletting contracts for carrying mails....	6
8. Orders of Second Assistant, as to contract for carrying mails.....	2

Postmasters—

1. As to adjustment of salaries of.....	xxi
2. As to compensation of.....	xxi
3. As to districts.....	158
4. Disbursements by.....	155
5. Of the fourth class, compensation of.....	xxi

Post-Nuptial Contract—

1. Competency of wife to make.....	175
2. Construction, obligation, and validity of.....	170

Post-Office—

1. Act establishing the.....	72
------------------------------	----

Post-Office Department—

1. Agents of.....	158
2. Authority of officers of, over Sixth Auditor.....	1
3. Order of, dated September 21, 1881, is void.....	4
4. Order of, dated October 8, 1881, is void.....	4
5. Order of, dated November 2, 1881, unauthorized.....	4
6. Practice of, as to pay drafts or orders.....	123
7. Revenues of.....	43
8. Sixth Auditor not subject to, in the settlement of accounts.....	4

Post-Offices—

1. Construction of.....	155
-------------------------	-----

Power—

1. Abuse of, a discretionary.....	147
2. Coupled with an interest.....	197
3. Difference between executive and judicial.....	xxxix
4. Discretionary, when grossly abused, may be reviewed.....	147
5. Execution of.....	191
6. Existence of, proved by legislative exception from.....	331
7. Grant of, to Postmaster-General, as to contracts for carrying mails.....	6
8. Of accounting officers to pass on claims on unliquidated damages.....	1
9. Of head of Department to appoint special agent.....	159
10. Of Postmaster-General to assign or transfer contracts for carrying mails.....	6
11. Of Sixth Auditor, to determine amount due contractors.....	4
12. Recognition by statute of existence of, equivalent to grant of.....	331
13. Recognized is a power granted.....	163
14. To employ agents by heads of Departments.....	60

Power of Attorney—

1. Executed by John J. Pulliam.....	231
2. Executed in blank invalid.....	204
3. For indorsement of drafts.....	190
4. Of corporation.....	14
5. To draw pay of deceased contestant.....	328

Powers—

1. And duties of executors and administrators.....	191
2. Classes of.....	360
3. Of Government distributed among the legislative, executive, and judicial departments.....	181

	Page.
<i>Powers—Continued.</i>	
4. Of public officers must be strictly pursued	82
5. To allow and to certify balances	136
<i>Powers of Attorney—</i>	
1. As to	24, 285
2. As to receipting pay-rolls	14
3. As to recognition of	24
4. As to void	13, 24
5. Claims collected under	13
6. Danger of forgery of	24
7. Difference between assignments and	30
8. Effect of date of making	13
9. Executed in contravention of the statute	14
10. For collecting excepted classes of claims	13
11. Not operating as an assignment	32
12. Regarding receipting pay-rolls under	28
13. Revocation of	24, 240
14. To indorse checks	28
15. When void	16
<i>Powers of Attorneys—</i>	
1. As to	XXVII
<i>Practice—(See Regulations; Usage.)</i>	
1. Adopted by accounting officers, as to	XLII
2. As to law of evidence in Treasury Department	XXIX
3. As to payment of drafts	239
4. In incongruous action in matters of	XV
5. In regard to appropriation warrants	217
6. In the courts as to	XXVIII
7. In Treasury Department as to accounts analogous to that in courts	XXI
8. In Treasury Department as to the prosecution of claims	XXVIII
9. Matters of in the Departments rarely reached by the courts	XV
10. Of Departments as to set-off	XXIX
11. Of Executive Departments	181
12. Of French Government as to transfer of title to <i>rentes</i>	293
13. Of Government regarding redemption and rights of holders of bonds	201
14. Of inserting permanent provisions in annual appropriation acts	299
15. Of making sales of Indian lands by authority of Indian treaties	369
16. Of paying officers and employés not specifically appropriated for	218
17. Of Treasury Department as to adverse claimants	203
18. Of Treasury Department as to agents	245
19. Of Treasury Department as to agents or attorneys	313
20. Of Treasury Department as to allowances to foreign representatives	271
21. Of Treasury Department as to appropriation acts	292
22. Of Treasury Department as to assignment of part interest in bonds	202
23. Of Treasury Department as to balances	213
24. Of Treasury Department as to cancellation and destruction of bonds	201
25. Of Treasury Department as to certificates on account	213
26. Of Treasury Department as to claims	213
27. Of Treasury Department as to commissioners' per diem	269
28. Of Treasury Department as to consular accounts	354
29. Of Treasury Department as to detailing clerks	248
30. Of Treasury Department as to disposition of moneys collected as legacy tax	207
31. Of Treasury Department as to distribution	238
32. Of Treasury Department as to duplicate drafts	241

	Page.
<i>Practice—(See Regulations; Usage)—Continued.</i>	
33. Of Treasury Department as to executors or administrators.....	231
34. Of Treasury Department as to income tax.....	274
35. Of Treasury Department as to internal revenue.....	243
36. Of Treasury Department as to orders of court.....	233
37. Of Treasury Department as to payment of claims.....	297
38. Of Treasury Department as to payment of drafts.....	234
39. Of Treasury Department as to payment of fractional part of bond.....	202
40. Of Treasury Department as to payment of informers.....	207
41. Of Treasury Department as to payment of salaries.....	297
42. Of Treasury Department as to payment of salaries to Congressmen.....	329
43. Of Treasury Department as to payment to representatives of deceased creditors.....	238
44. Of Treasury Department as to registered bonds.....	286
45. Of Treasury Department as to set-off.....	208
46. Of Treasury Department as to substitutes.....	346
47. Of Treasury Department as to transfer of legal title to registered bonds.	203
48. Of Treasury Department in matters connected with the office of the First Comptroller.....	xv
49. Of Treasury Department relative to contracts with informers.....	205
50. Of Treasury Department under loan acts.....	203
51. Questions relating to Treasury Department.....	xx
52. Under which money is advanced to pension agents.....	185
<i>Pratt, D. D.—</i>	
1. Commissioner of Internal Revenue, circular letter of.....	244
<i>Preamble—</i>	
1. Of a statute, averment therein.....	277
<i>Precedent—</i>	
1. As to.....	xxxviii
<i>Predecessor—</i>	
1. As to contested seat in Congress.....	321
2. As to <i>de jure</i> and <i>de facto</i>	327
3. What is a, of a Representative in Congress.....	325
4. Who is a.....	327
5. Of Commissioner of Internal Revenue.....	xxxii
<i>Pre-emption Claims—</i>	
1. To lands, interference of courts respecting.....	xli
<i>Premium—</i>	
1. For negligence.....	360
<i>Prescription—</i>	
1. Improperly prepared.....	132
<i>President—</i>	
1. As to authority to appoint agents of the.....	xviii
2. As to independent powers of.....	xxiii
3. As to reconstruction of.....	343
4. Authority of, as to execution of the law.....	228
5. Authority of, over diplomatic and consular service.....	25
6. Authority of, over expenditures as to epidemic diseases.....	225
7. Discretion of, over aid to State and local boards of health.....	225
8. Duty of, as to vacancies in the public service.....	115
9. Duty of, to invite guests incidental and implied.....	145
10. Files of, communications and orders of.....	285
11. Instructions of, as to school farms.....	339
12. Of the United States, secretary of, authorized to sign name of to land- warrants by special law.....	83

	Page.
<i>President—Continued.</i>	
13. Order of, as to Second Comptroller performing duties of the First Comptroller and Deputy First Comptroller.....	284
14. Payments allowed by.....	155
15. Power and duties of, as to the public health.....	223
16. Power of, as to pension agents.....	115
17. Power of, to appoint officer to perform duties of First Comptroller.....	283
18. Power of, to revoke dismissal of military officer.....	xxxiii
19. Requested to extend invitation.....	144
20. Salary of, protected by Constitution.....	119
21. Selection by, of proper officers or agents to execute the laws.....	226
22. Special power of.....	142
<i>President Grant—</i>	
1. Treaties as to lands withdrawn from Senate by.....	370
<i>President Johnson—</i>	
1. As to reconstruction.....	344
2. Treaty of, as to Indian lands in Kansas.....	370
<i>President's Proclamation—</i>	
1. May 19, 1862, referred to.....	337
<i>Principal and Deputy—</i>	
1. Relations between.....	85
<i>Principle—</i>	
1. As to repeals.....	154
2. Authorizing payment of bonds and interest checks.....	182
<i>Principles—</i>	
1. As to settlement of general.....	xvii
2. Of common law, as to payment of claims considered.....	16
<i>Printing and Bill Clerk—</i>	
1. As to.....	362
<i>Prior Equities—</i>	
1. Of the indorser.....	293
<i>Private Act—</i>	
1. Construction of, should be liberal.....	316
<i>Private Parties—</i>	
1. Forfeiture of rights and property as to a judgment of.....	8
<i>Private Person—</i>	
1. As to charging of, by Comptroller with a liability.....	xxxii
<i>Private Relief Act—</i>	
1. As to.....	342
2. Refunding tax under.....	315
<i>Privy in Estate—</i>	
1. With the United States, with full knowledge, Sanborn is.....	211
<i>Probate Courts—</i>	
1. Authority of, as to disposition of bonds.....	196
<i>Probate Statutes—</i>	
1. As to disposition of bonds.....	196
<i>Proceedings—</i>	
1. Involving right to or possession of drafts.....	234
<i>Proceeds—</i>	
1. Of leases and sale of land by United States, disposition of.....	334
2. Of leases and sales as to appropriations.....	337
3. Of the hospital tax.....	50
<i>Proceeds of Property—</i>	
1. Six excepted classes of.....	38
<i>Proceeds of Sales Case.....</i>	35

	Page.
<i>Proceeds of Sales—</i>	
1. Classification of.....	41
2. Expenses of depositing.....	369
3. Of old material, disposition of....	36
<i>Process—</i>	
1. By which payment of claim is secured.....	xxviii
2. How returned.....	89
3. Mileage for serving.....	88
4. Personal service of.....	xxxix
<i>Proclamation—</i>	
1. July 13, 1865, reconstruction.....	344
2. July 13, 1869, reconstruction.....	344
3. July 15, 1869, reconstruction.....	344
4. May 14, 1869, reconstruction.....	344
5. Of Governor Joseph E. Brown.....	343
6. Of President as to reconstruction	343
<i>Proctors—</i>	
1. As to.....	xxvii
<i>Professional Retainer—</i>	
1. A person employed by the Attorney-General under sections 363 and 366 of the Revised Statutes to assist a district attorney is not an officer. Such employment is a. (See opinion Attorney-General Williams, June 6, 1874 (14 Op. Att'y-Gen., 406).....	355
2. Is not an office. The Constitution, article 1, section 6, does not prohibit a member of Congress from being so employed	355
<i>Professional Services—</i>	
1. As to illness and burial of late President Garfield.....	374
2. Of Congressmen as attorneys.....	357
<i>Prohibition—</i>	
1. As to statutory.....	246
<i>Prohibitory Statutes—</i>	
1. Relating to Congressmen.....	355
<i>Promise—</i>	
1. Of husband, validity and force of.....	177
2. Right to compel performance of.....	169
<i>Promissory Note—</i>	
1. Indorsed in name of father by daughter.....	80
<i>Promissory Notes—</i>	
1. As simple contract debts.....	235
<i>Property—</i>	
1. As to destruction or appropriation of, by Army or Navy.....	xxxviii
2. Captured or abandoned.....	xxxviii
3. Control and jurisdiction of States as to.....	235
4. Exchange or sale of Government.....	57
5. Lost in military service.....	266
6. Of the holder, draft indorsed becomes.....	233
7. Personal or movable, rights of married parties in respect to	173
8. Regarding sales of old material.....	36
9. Six classes, as to proceeds of sales.....	44
<i>Proposals—</i>	
1. For carrying mails.....	309
<i>Proposition—</i>	
1. Of Congress to donate money to certain States.....	331
<i>Propositions—</i>	
1. As to assent of parties.....	338

	Page.
<i>Prosecution—</i>	
1. Criminal, as to judicial proceedings against accounting officers.....	XXXVI
<i>Protest—</i>	
1. Against honoring pay drafts.....	124
<i>Provision—</i>	
1. In a statute, a special and particular.....	225
<i>Provisional Governors—</i>	
1. As to reconstruction.....	343
<i>Provisions—</i>	
1. For domestic use, responsibility of sellers of.....	132
2. For refunding taxes.....	319
3. In appropriation act, as to particular.....	298
4. In statute conflicting.....	274
5. Made for payment of bonds.....	200
6. Of contract.....	1
7. Specific, control general.....	365
8. Two affirmative, as to.....	149
<i>Proviso—</i>	
1. As to remission of taxes.....	316
2. In an appropriation, effect of.....	298
<i>Proviso Bar—</i>	
1. Excepting claims from benefit of certain provisions.....	319
<i>Provisos—</i>	
1. Construction and interpretation of.....	304
<i>Publication—</i>	
1. Of decisions of First Comptroller, reasons justifying.....	XXII
2. Of decisions of First Comptroller, when commenced.....	XV
3. Of First Comptroller's decisions, as to.....	XLI
<i>Public Building—</i>	
1. Commissions to postmaster for disbursements for construction of.....	155
<i>Public Credit—</i>	
1. Effect on, of refusal to recognize authority of foreign guardians.....	182
<i>Public Disbursements—</i>	
1. Embarrassment as to payment by checks.....	65
<i>Public Funds—</i>	
1. Of France, not negotiable.....	293
<i>Public History—</i>	
1. As to construction of statutes.....	296
<i>Public Lands—</i>	
1. Erroneously sold, as to.....	XIX
2. Fees, as to.....	367
<i>Public Money—</i>	
1. Advances of.....	66
2. As to receivers of.....	368
3. In hands of collector of internal revenue.....	245
<i>Public Officer—</i>	
1. A, cannot authorize his signature to be affixed to an official document when the law requires it to be signed by himself.....	83
2. As to title to salary of deceased.....	270
3. Cannot delegate quasi-judicial duty.....	76
4. General rule by Justice Story regarding.....	77
5. May delegate ministerial but not quasi-judicial duty to a deputy.....	62
<i>Public Officers—</i>	
1. Powers of, must be strictly pursued, else their decision or action is a nullity.....	82

	Page.
<i>Public Papers</i> —(See <i>Papers</i> .)	
<i>Public Policy</i> —	
1. Assignment of not due salary is contrary to.....	395
2. As to substitutions.....	347
3. Considerations of.....	114
4. Forbids compensation for services rendered in violation of law.....	113
5. General principles of.....	100
6. Requirements of.....	114
<i>Public Printer</i> —	
1. Authority of, as to contract.....	106
2. Contracts by, without advertising.....	93
3. Lettings by.....	92
4. Not entitled to relief on legal principles.....	111
5. Purchase of material.....	93
6. Required to publish First Comptroller's decisions.....	v
<i>Public Property</i> —	
1. Use of, not authorized by law.....	59
<i>Public Schools</i> —	
1. In District of Columbia.....	305
<i>Public Securities</i> —	
1. Construction, obligation, and validity of.....	170
2. Three classes of.....	290
<i>Public Service</i> —	
1. As to.....	308
2. Persons in the.....	306
<i>Pulliam, John J.</i> —	
1. Party in Halstead's case.....	231
<i>Pulliam, John N.</i> —	
1. Party in Halstead's case.....	232
<i>Punctuation</i> —	
1. Effect of, in a statute.....	225
2. Effect of, in construction of statutes.....	283
3. Erroneous, as to.....	315
<i>Purchaser</i> —	
1. Of bonds, first and subsequent.....	204
2. Of registered bond, rights of.....	286
<i>Purpose</i> —	
1. Effect of, to language in an act.....	331
Q.	
<i>Quantum Meruit</i> —	
1. As to remedy of subcontractor for carrying mails.....	11
<i>Quarantine Stations</i> —	
1. As to board of health.....	221
<i>Quartermaster</i> —	
1. As to claim of.....	xxxvii
<i>Questions</i> —	
1. Affecting the liability of the United States.....	xviii
2. Arising in relation to claims.....	xx
3. Arising in the Treasury Department, impracticability of Attorney-Gen- eral to decide all.....	xvi
4. Arising on appeals from Sixth Auditor.....	xix
5. As to assignment of salaries, compensations, and claims.....	xx
6. As to authority for expenditures.....	xviii
7. As to authority of heads of Departments and others to appoint agents.....	xviii

	Page
<i>Questions—Continued.</i>	
8. As to authority of the President to appoint agents	xviii
9. As to disbursements by District Commissioners	xix
10. As to indorsements on drafts	xix
11. As to liability of Government to refund money to purchasers of public lands.....	xix
12. As to liability of Government to refund taxes.....	xix
13. As to liability of officers to the Government	xix
14. As to ownership of drafts	xix
15. As to right of courts to appropriate drafts to the credit of their holders.	xix
16. As to validity of Treasury warrants.....	xx
17. As to various kinds of appropriations	xix
18. As to whether acts make appropriations	xix
19. Decided in the Departments, as to.....	xvi
20. In Treasury Department, analogous to those in courts as to adjustment of claims	xxx
21. Involving controverted titles, as to	xviii
22. Relating to construction of acts	xviii
23. Relating to Treasury Department practice	xx
24. Submitted to Comptroller	xlii
<i>Questions of Fact—</i>	
1. Jurisdiction of accounting Officers, as to.....	xvii
2. Responsibility of Governments in relation to the investigation of.....	198
<i>Questions of Law—</i>	
1. Arising in First Comptroller's Office.....	xv
2. As to claims involving controverted	xxxviii
3. Contradictory decisions on similar	xv
4. In the Departments, determined to a limited extent only by the courts.	xvi
5. Which do not reach the courts, determined by accounting officers.....	xxiv
<i>Quorum—</i>	
1. As to authority to indorse	191
<div>R.</div>	
<i>Railroad Grant Acts—</i>	
1. As to public lands in Kansas.....	370
<i>Rate of Production—</i>	
1. Estimated and actual, as to distilling	395
<i>Ratification—</i>	
1. When legal, of invalid contract, force of	199
<i>Reading Clerks—</i>	
1. Of House, as to	362
<i>Realty—</i>	
1. Of marine hospitals	52
<i>Reasonable Time—</i>	
1. As to	338
<i>Reasons—</i>	
1. Justifying publications of decisions of First Comptroller	xxii
<i>Rebellion—</i>	
1. As to acts of Army or Navy in suppression of the.....	xxxviii
2. Crime of	52
3. Punishment of, as treason	161
4. Suppression of.....	345
<i>Receipt—</i>	
1. For money paid indorser upon warrant	26
2. Of Public Printer for printed matter, not a ratification of the original contract	071

	Page.
Receipts—	
1. Post dated are unauthorized	29
2. Showing payment of salaries, as to	xxvii
Receivers—	
1. Of public moneys.	75, 158
2. Of public moneys as to sales of land	365
Recognition—	
1. Of a power, force of	297
Reconstruction Acts—	
1. Dates of, for the several States	345
Reconstruction—	
1. As to	343
2. Of States	343
Record Evidence—	
1. As to disposition of registered bonds	192
Record—	
1. Of canceled and destroyed bonds	201
Records—	
1. As to relief for loss of	xxxviii
2. In Treasury Department as to	xv
3. Of corporations, as to indorsements	190
Rectified—	
1. Tax of	131
Redemption—	
1. Of fractional parts of notes	200
2. Of United States bonds	201
Reduction—	
1. Of salary by act August 5, 1882, effect of provisions for	216
Reference—	
1. Facilities for, in Treasury Department	xv
Refund—	
1. Of taxes	274, 315
2. Of taxes, as to	xv
Registered Bond—	
1. Invalidity of judicial sale of	288
2. Legal disposition of	174
Registered Bonds. (See Bonds.)	
1. Assignable, but not negotiable	286
2. Assignment in blank of	200
3. As to	286
4. Description of	204
5. Have some attributes of negotiability	295
6. Purchased with wife's means	170
7. Transfer of	286
8. When transferable	287
Register of the Treasury—	
1. As to power of delegating duties of	62
2. Delegated duties of deputy	72
3. Must himself certify all warrants, bonds, and draft	68
4. Papers filed with, as to illness and burial of late President Garfield	377
5. To record all warrants	67
Registers—	
1. Of district land offices	158
2. Of the Land Office	75

	Page.
<i>Registers and Receivers—</i>	
2. As to expenses of depositing.....	369
2. Incidental expenses of	369
3. Salaries of	369
<i>Regulation—</i>	
1. Consular, as to relief of seamen.....	138
2. Of Executive Department as to claims.....	xxxvii
3. Of Executive Department, effect of recognition by Congress of.....	46
<i>Regulations—(See Consular Regulations.)</i>	
<i>Regulations—</i>	
1. As to assignment of bonds.....	23
2. As to claimants.....	xxvii
3. As to claimants and attorneys.....	313
4. As to infected vessels.....	236
5. As to redemption of notes and bonds.....	200
6. As to sale of bonds by assignment.....	194
7. Authority of Secretary for prescribing.....	242
8. Circular No. 16 as to taxes.....	275
9. In departments as to attorneys, &c.....	xxvii
10. Of August 24, 1876, as to disbursing officers.....	159
11. Of Secretary of Treasury as to duties of clerks.....	249
12. Of Secretary of Treasury as to repayment of income tax.....	274
13. Of Secretary of the Treasury as to transfer of bonds.....	203
14. Of the Army of the United States.....	36
15. Of Treasury Department as to Government bonds.....	184
16. Of Treasury Department as to statements of deposits.....	157
17. Of Treasury Department, authorizing assignment of part interest in bonds not due.....	202
18. Of Treasury Department have force of law.....	176
19. Prescribing mode of assigning registered bonds.....	34
20. Regarding replacement of mutilated notes.....	167
21. Relative to public moneys and checks.....	88
22. Treasury Department, regarding payment of money.....	25
23. Treasury Department, regarding powers of attorney.....	25
<i>Regulations, Postal—(See Postal Regulations.)</i>	
<i>Rehearing—</i>	
1. On rejected claims, as to a.....	xxviii
<i>Reimbursement—(See Compensation.)</i>	
<i>Reinstatements—</i>	
1. As to.....	345
<i>Reissue—</i>	
1. Of bonds in case of divided interests.....	202
2. Of registered bonds.....	236
<i>Rejected Claims—</i>	
1. Mode of securing a rehearing on.....	xxviii
<i>Relief—</i>	
1. As to, for loss of public papers.....	xxxviii
2. As to, for loss of records	xxxviii
3. As to, for loss of vouchers.....	xxxviii
4. Court may give to rightful claimant.....	xxxix
5. For destitute American seamen.....	138
6. For loss of Government funds.....	xxxviii
7. In the courts, as to parties seeking.....	xxx
8. Of sick and disabled seamen.....	49
9. Parties seeking in the courts.....	xxvi
10. When claim is disallowed.....	102

	Page.
<i>Remedial Justice—</i>	
1. Each State regulates its own system of.....	235
<i>Remedial Statute—</i>	
1. As to construction of.....	315
<i>Remedies—</i>	
1. For collection of debts.....	235
<i>Remedy—</i>	
1. As to special statutory.....	201
2. By suit as to Treasury drafts.....	231
3. For a right under a statute.....	200
4. For diseases.....	131
5. In cases of seizures.....	xxxviii
6. In Court of Claims, as to payment for fractional part of bonds.....	205
7. Of judicial process.....	9
8. When Comptroller refuses to certify balance due.....	79
<i>Removals—</i>	
1. As to.....	345
2. As to vacations.....	346
<i>Rent—(See Contingent Expenses.)</i>	
<i>Rent of Prisons—</i>	
1. As to.....	354
<i>“ Rentes ”—</i>	
1. Certificates of public debt, not negotiable.....	293
<i>Reorganization—</i>	
1. Of insurrectionary States.....	344
<i>Repayment—(See Refunding.)</i>	
<i>Repeal—</i>	
1. Appropriation act operating as a.....	309
2. As to section 3617, Revised Statutes.....	365
3. By implication of general laws.....	298
4. By implication, provisions of statute as to.....	331
5. Difference between exception and.....	368
6. Effect of, on other statutes.....	154
7. Of law levying legacy-tax, before legacy in Sanborn case became due..	209
8. Of statute by implication, provisions as to.....	331
9. Provision for payment of moieties repealed by act June 6, 1872.....	212
<i>Repeals—</i>	
1. By implication not favored.....	160
<i>Reported Cases—</i>	
1. As to.....	xxvi
<i>Reported Decisions—</i>	
1. As monuments of learning.....	xxxiii
<i>Report of Board of Audit—</i>	
1. Copy of, as to illness and burial of late President Garfield.....	378, 386
<i>Report of Select Auditing Committee—</i>	
1. Copy of, as to illness and burial of late President Garfield.....	390
<i>Report of the Secretary of the Treasury—</i>	
1. On finances, 1857, quoted from.....	64
2. On finances, 1878, quoted from.....	64
<i>Reporter—</i>	
1. As to Supreme Court.....	296
<i>Reporter of the Supreme Court—</i>	
1. As to pay of.....	363

	Page.
Reports—	
1. Annual, of the Commissioner of Agriculture	93
2. Of Commissioner of Internal Revenue, as to direct-tax acts	334
3. Of decisions of Supreme Court, as to price of	297
Representative in Congress—	
1. As to extra pay to	357
2. Salary and accounts of traveling expenses of	328
3. Vacancy in office of	321
Representatives—	
1. As to compensation of	xxx
2. Election of, as to meaning of officer	358
Repugnant Provision—	
1. As to repeal	260
Requisition—	
1. As to illness and burial of late President Garfield	377
2. For payment of draft	349
3. Money advanced to pension agents on their	187
4. Of Secretary of War, in false description case	266
Requisitions—	
1. By Treasury Department, for copies of First Comptroller's Decisions	xv
Res Adjudicata—	
1 As applied to adjudications by accounting officers, and those by the courts, difference between rules of	xxxii
2. As to judgment of a comptroller	xxxi
3. As to law of	xxx
4. As to limitation of fees or actual traveling expenses of marshals	164
5. Law of, as applied to judicial judgments	xxiv
6. Law of, as to decisions of Comptroller	xxiv
Re-sale—	
1. Right of	58
Resales and leases—	
1. Receipts from	334
Reserved Sections—	
1. Alternate as to public lands in Kansas	370
Resident Creditors—	
1. Policy of favoring	236
Residue—	
1. As to payment for carrying mails	1
2. Of one year's salary, disposition of	271
Resignation—	
1. As to, of military officer	xxxiii
Resignations—	
1. As to	345
2. As to vacations	346
Resolution—	
1. In Congress as to vacancy	325
2. Of House of Representatives as to contestant's seat	322
3. Of House of Representatives as to contested elections in Alabama	322
4. Of House of Representatives quoted	378
5. Of House unseating <i>de facto</i> member	322
Responsibility—	
1. Of executive officers	xxvii
Retailer—	
1. Tax of	131

Retainer—

1. A person employed by the Attorney-General under sections 363 and 366 of the Revised Statutes to assist a district attorney is not an officer. Such employment is a professional retainer (see opinion Attorney-General Williams, June 6, 1874, 14 Op. Att. Gen., 406) 355
2. A professional retainer is not an office. Such employment is not a contract within the meaning of sections 3739, 3742 of the Revised Statutes. 355

Retroactive Provisions—

1. In appropriation act..... 214

Revenue Acts—

1. Doubtful construction in 283

Revenue Agents—

1. Appointment of 251
2. Duties of, under direction of Secretary of the Treasury..... 251

Revenue Cutters—

1. Sale of 55

Revenue Law—

1. Evasion of 129

Revenue (see Internal Revenue.)

1. Of the District of Columbia..... 263
2. Superintending collection of 249

Reversing Judgment—

1. Cause for 147

Revised Statutes—

1. Ascertaining meaning of..... 42
2. Counter-signature of warrants 24
3. Enacted June 22, 1874 154
4. Modification of 311
5. Permit and regulate assignment and contract with Indians.. 15
6. Publication and distribution of v
7. Quoted as to sale of old material 38
8. Regarding doubts as to meaning of provisions of 36
9. Relating to District of Columbia..... 260
10. Richardson's supplement to 264
11. Sections referred to as to sales of old material 41
12. Section 11, style and title of act 335
13. Section 11, title of the appropriation acts 331
14. Section 26, vacancies in Congress 323, 325
15. Section 28, oath of Senators 358
16. Section 30, oath of Representatives 358
17. Section 31, roll of Representatives..... 323, 326
18. Section 35, salary of Representative 329
19. Sections 35 and 36, compensation of President of Senate and of Representative xxx
20. Sections 37 and 38, salary of Speaker and Representatives..... xxx
21. Section 38, salary of Representatives..... 323, 326, 330
22. Section 38, quoted from 330
23. Section 39, oath as to salary xxx
24. Section 39, salaries of Representatives 324
25. Section 39, salary, oath..... 330
26. Section 39, salary payable monthly..... 326
27. Sections 39, 46, 47, 48, 49, 50, and 51, quoted 324
28. Section 40, deductions of salary..... xxx
29. Section 41, deductions for books..... xxx
30. Section 41, deductions for withdrawal from seat..... xxx

	Page.
<i>Revised Statutes—Continued.</i>	
31. Section 43, no allowance for newspapers.....	xxx
32. Section 44, postage.....	xxx
33. Section 45, salary in lieu of allowances.....	xxx
34. Section 46, mode of payment of salaries.....	324
35. Section 46, payment of compensation.....	xxx
36. Section 47, certificate of salary.....	330
37. Section 47, salary and accounts.....	324
38. Section 47, traveling expenses.....	xxx
39. Section 48, certificate for salary.....	324
40. Section 48, certificates by presiding officers.....	xxx
41. Section 48, conclusiveness of Comptroller's certificate.....	13
42. Section 48, effect of certificate.....	330
43. Section 49, pay of member dying, &c.....	322, 324, 328, 329, 330
44. Section 49, quoted from.....	329
45. Section 49, salaries to deceased members.....	xxx
46. Section 50, limit as to salaries.....	xxx
47. Section 50, limit as to salary.....	324
48. Section 51, pay of members who fill vacancies.....	xxx
49. Section 51, pay of Representatives.....	322, 323, 325, 326, 327
50. Section 51, vacancies, pay.....	324
51. Section 53, officers and employes of House.....	362
52. Section 56, Secretary of the Senate, as to.....	28, 62, 159
53. Section 57, bond of Secretary of the Senate.....	28, 62, 159
54. Section 58, bond of Clerk of House.....	28, 62, 159, 362
55. Section 62, reports of disbursing officers.....	159
56. Section 62, reports of subordinate disbursing officers.....	28, 62
57. Section 72, statement proceeds of sales.....	38
58. Section 86, Library of Congress.....	53
59. Section 104, proceedings against unwilling witnesses.....	158
60. Section 161, departmental regulations.....	201, 242, 251, 290
61. Section 161, departmental regulations.....	xxvii, xxviii
62. Section 161, quoted as to prescribing regulations.....	242
63. Section 161, regulations.....	249
64. Section 161, regulations of Treasury Department.....	xxix
65. Section 162, business hours.....	251
66. Section 163, classification of clerks.....	251
67. Section 166, clerks.....	251
68. Section 166, distribution of clerks.....	247
69. Section 167, salaries.....	217
70. Section 169, authority to employ clerks, &c.....	217, 346, 349
71. Section 169, clerks and other employes.....	251
72. Section 170, extra compensation, prohibited.....	159
73. Section 171, extra clerks.....	247, 251
74. Section 173, chief clerks.....	247, 349
75. Section 173, duties of chief clerk First Comptroller's Office.....	70
76. Section 174, chief clerks.....	249
77. Section 174, duties of chief clerks.....	247, 249
78. Section 174, chief clerks to distribute duties.....	349
79. Section 174, duties of chief clerk of First Comptroller's Office.....	70
80. Section 176, disbursing clerks.....	28, 62, 159, 302, 349
81. Section 177, vacancies temporarily filled.....	283
82. Sections 177, 178, quoted.....	283
83. Section 178, vacancies in subordinate offices.....	383
84. Section 179, authority of President.....	284

	Page.
<i>Revised Statutes—Continued.</i>	
85. Section 180, temporary appointments.....	284
86. Section 181, restriction on temporary appointments.....	284
87. Section 182, extra compensation	284
88. Section 183, administering oath to witness	XXIX
89. Section 183, investigations	XXX
90. Section 183, investigating frauds.....	XXVIII
91. Section 183, oaths	XXVII
92. Section 183, oaths	245, 249
93. Section 183, quoted	249
94. Section 183, taking oaths	XXXIV
95. Section 184, answers to interrogatories	XXX
96. Section 184, as to witnesses	XXVIII
97. Section 184, depositions	XXXIX
98. Section 184, evidence as to claims.....	XXVIII
99. Section 184, subpoenas.....	XXVII, XXXIV
100. Section 184, subpoenas to witnesses.....	23, 134, 140, 147, 196
101. Section 185, compensation to witnesses	XXX
102. Section 185, fees to witnesses	XXVII, XXVIII, XXIX, XXXIV
103. Section 186, compelling testimony.....	XXVII
104. Section 186, disobedient witness	XXIX
105. Section 186, refusing to testify.....	XXX
106. Section 186, testimony	XXVIII
107. Section 186, unwilling witness.....	XXXIV
108. Section 187, assistant attorneys	XXIX, XXX, XXXIV
109. Section 187, professional service in investigating fraud	XXVIII
110. Section 187, professional assistance.....	XXVII
111. Section 187, professional assistance.....	147, 196
112. Section 190, former employés	XXVIII
113. Section 190, prosecuting claims	22
114. Section 190, prosecuting claims	XXVII
115. Section 191, as to accounting officers.....	XVI
116. Section 191, as to balances	XXVII
117. Section 191, authorizing payment	XXVIII
118. Section 191, certificates cannot be changed.....	XXVIII
119. Section 191, certified balances	13, 137, 140, 146, 147, 213, 225, 353, 356
120. Section 191, certifying balances	XVII
121. Section 191, Comptroller's certificate conclusive	XXXI
122. Section 191, Comptroller's decision conclusive	102
123. Section 191, conclusiveness of Comptroller's decisions	XXVII
124. Section 191, judgment of Comptroller	29
125. Section 191, new trial	XXVIII
126. Section 191, revision of claims	16
127. Section 197, statement proceeds of sales	38
128. Section 201, officers in State Department	349
129. Section 201, subordinate officers in Department of State	159, 302
130. Section 215, subordinate officers, War Department.....	302
131. Section 233, Department of the Treasury.....	245, 247, 251, 303
132. Section 234, Assistant Secretaries	346
133. Section 235, subordinate officers, Treasury Department	159, 247, 251, 302
134. Section 236, jurisdiction of accounting officers	23
135. Section 236, liability.....	XXXII
136. Section 236, public accounts	XVII, XXIX, XXXIX
137. Section 236, settlement of public account	16, 29, 53, 96, 137, 140, 146, 147, 187, 251, 302, 352, 377

Revised Statutes—Continued.

138. Section 245, Assistant Secretaries	67
139. Section 245, duties of Assistant Secretaries	16, 67, 82
140. Section 246, Secretary Treasury	61
141. Section 246, signing warrants	68, 82
142. Section 247, effect of warrants	68, 82
143. Section 248, duties of the Secretary ..	29, 67, 68, 213, 240, 242, 248, 249, 302, 303, 377
144. Section 248, issuing warrants	16, 24
145. Section 248, quoted as to superintending collection of revenue	242
146. Section 250, settlement of accounts	146
147. Section 250, settlement of accounts within fiscal year	140
148. Section 251, regulations, forms	245, 249, 251
149. Section 251, quoted	242
150. Section 251, quoted as to prescribing forms	242
151. Section 255, appointment of disbursing agents	28, 62, 155, 157, 159, 160, 162
152. Section 255, construed	160
153. Section 255, disbursing agents	158, 302
154. Section 255, quoted	157
155. Section 256, employment of detectives	212
156. Section 268, Comptrollers	346
157. Section 269, adjustment of accounts	16
158. Section 269, bonds and coupons	35
159. Section 269, Comptroller's accounts	29
160. Section 269, countersigning warrants	XXVIII, XXXII
161. Section 269, drafts on warrants	XXVIII
162. Section 269, duties of First Comptroller	XVI, XX, XXVII, XXVIII
163. Section 269, First Comptroller ..	16, 67, 68, 82, 137, 140, 146, 147, 187, 200, 213, 225, 240, 302, 352, 377
164. Section 270, appeal from Sixth Auditor	XX
165. Section 270, appeals from settlements made by the Sixth Auditor	XXI
166. Section 270, appeals to First Comptroller	XXVII
167. Section 270, as to settlement of accounts	4
168. Section 270, conclusiveness of Comptroller's decisions on appeal	XXVII
169. Sections 270 and 277, cited	5
170. Section 273, duties of Second Comptroller	XXVII, XXVIII
171. Section 273, duties of Second Comptroller	187, 302
172. Section 275, signing bounty certificates	73
173. Sections 276 and 277, Auditors ..	16, 137, 140, 146, 147, 187, 200, 225, 302, 346, 352, 377
174. Sections 276 to 300, as to duty of Auditors	XVII, XXVI
175. Section 277, Auditor's accounts	29
176. Section 277, duties of Auditors	XVI, XX, XXI, XXVI
177. Section 277, duties of Sixth Auditor	XXVII
178. Section 277, duties of Sixth Auditor	4
179. Section 277, settlement of mail contractor's accounts	5
180. Section 279, signing bounty certificates	73
181. Section 300, claim for subsistence	18, 23
182. Sections 301 and 305, Treasurer, duties of	179, 200, 240, 292, 302, 377
183. Section 304, Assistant Treasurer	73
184. Section 305, authorizing regulations as to drafts	25
185. Section 305, bonds, assignments	35
186. Section 305, duties of the Treasurer	XXVIII
187. Section 305, payments of claims	16
188. Section 305, payment of drafts	35
189. Section 305, payment of drafts	XXVIII

	Page.
<i>Revised Statutes—Continued.</i>	
190. Section 305, payment of warrants.....	24
191. Section 305, Treasurer, duties of	16
192. Section 305, Treasurer, warrant, draft	25
193. Section 306, liabilities outstanding	23, 25
194. Section 306, outstanding liabilities, as to	18, 63, 200, 292, 302
195. Section 307, drafts, checks, vouchers.....	35
196. Section 307, vouchers for unpaid drafts	23, 25, 62, 63, 68, 292, 302
197. Section 308, payment of outstanding drafts.....	23, 25, 35, 63, 292, 302
198. Section 308, vouchers, drafts, checks	35
199. Section 309, accounts of disbursing officers	200
200. Section 310, reports of disbursing officers	200
201. Section 311, Treasurer's accounts	25, 200
202. Section 313, duties of the Register.....	16, 67, 68
203. Section 315, Assistant Register.....	62, 68, 72
204. Section 316, Commissioner of Customs	302
205. Section 317, Commissioner of Customs	53
206. Section 317, duties of Commissioner of Customs	xxvii, xxviii
207. Section 319, Commissioner of Internal Revenue	247
208. Section 319, quoted as to Commissioner of Internal Revenue.....	242
209. Section 319, quoted from.....	242
210. Section 321, blanks, stamps, &c.....	242
211. Section 321, duties Commissioner Internal Revenue.....	129, 242
212. Section 321, quoted as to Commissioner of Internal Revenue.....	242
213. Section 321, quoted from.....	242
214. Section 323, Deputy Commissioner Internal Revenue	73
215. Section 336, negotiability of drafts.....	35
216. Section 351, subordinate officers, Department of Justice	159, 302
217. Section 356, as to the opinion of the Attorney-General	xvi
218. Section 356, as to work in the Treasury Department	xvi
219. Section 393, subordinate officers in Post-Office Department.....	159
220. Section 396, duties of the Postmaster-General.....	128
221. Section 397, statement of proceeds of sales.....	38
222. Section 416, clerks and employés, Navy Department	302
223. Section 416, subordinate officers in Department of the Navy.. ..	159
224. Section 440, clerks and employés, Department of the Interior	302
225. Section 440, subordinate officers in the Department of Interior	159
226. Section 446, Commissioner General Land Office	xxvi
227. Section 456, relative to lands.....	xxvi
228. Section 492, lithographing and engraving	105
229. Section 496, disbursements for Patent Office	28, 62, 159, 302
230. Section 522, clerks and employés, Agricultural Department	302
231. Section 524, Commissioner of Agriculture.....	302
232. Section 530, judicial districts	158
233. Section 627, commissioners.....	92
234. Section 627, commissioners of circuit courts	89
235. Section 627, commissioners of courts	89
236. Section 677, clerk, marshal, &c	299
237. Section 681, Decision of Supreme Court	300
238. Section 681, Supreme Court.....	301
239. Section 682, Reporter of Supreme Court.....	300
240. Section 682, reporter's salary.....	297
241. Section 682, reports of Supreme Court	301
242. Sections 682 and 3689, quoted from	301
243. Section 721, rules of decisions in trials at common law	xxii

	Page.
<i>Revised Statutes—Continued.</i>	
244. Section 727, security for good behavior	89
245. Section 767, district attorneys.....	158
246. Section 770, salaries, district attorneys	119
247. Section 776, marshals.....	113, 158
248. Section 779, marshal's term	112
249. Section 783, marshal's bond	158
250. Section 787, duties of marshal.....	89
251. Section 788, marshals, powers of	119
252. Section 789, marshals, death of	119
253. Section 790, marshals, executing process	112
254. Section 790, marshals, removal of	119
255. Section 793, filling vacancy	112
256. Section 793, vacancies in office of district attorney and marshal	119
257. Section 824, fees.....	120
258. Section 827, fees	120
259. Section 829, as to marshal's traveling expenses	xii
260. Section 829, compensation of marshals.....	90
261. Section 829, marshals' fees	88, 163
262. Section 829, marshals' fees, mileage	164
263. Section 829, marshals' fees, limitation	165, 166
264. Section 829, marshals' fees	181
265. Section 833, returns of fees.....	120
266. Section 835, compensation, district attorney	120
267. Section 835, compensation, district attorneys	121
268. Section 846, accounts, district attorneys.....	114
269. Section 846, accounts for services performed	112
270. Section 846, attorneys, supervisors	153, 154
271. Section 847, commissioners' fees.....	268, 270
272. Section 847, quoted from.....	268
273. Section 917, practice of circuit and district courts	89
274. Section 918, practice of courts regulated.....	89
275. Section 951, allowance of credits.....	xxix
276. Section 951, quoted.....	xxix
277. Section 951, suits against individuals.....	xxix
278. Section 989, executions not to issue, &c.....	211
279. Section 1014, criminal procedure.....	89
280. Section 1014, offenders.....	89
281. Section 1058, Representatives practicing in courts.....	359
282. Section 1059, claims, set-offs.....	21
283. Section 1059, counter claims.....	xxix
284. Section 1059, jurisdiction of Court of Claims.....	205
285. Section 1059, quoted, Court of Claims.....	xxix, xxxvii
286. Section 1063, claims involving controverted questions.....	xxxviii
287. Section 1063, claims referred.....	xxiv
288. Section 1063, quoted.....	xxxviii
289. Section 1153, fortifications, disbursements	28, 62, 159
290. Section 1241, sale of military stores.....	46
291. Section 1241, statement of proceeds of sales.....	38
292. Section 1269, allowances.....	213
293. Section 1291, pay of soldiers, assignment of.....	13, 15, 27
294. Section 1291, quoted.....	15
295. Section 1291, referred to.....	13
296. Section 1342, art. 60, fraudulent claims.....	22
297. Section 1382, paymaster of the fleet.....	28, 62, 159

	Page.
<i>Revised Statutes—Continued.</i>	
298. Section 1440, discourage sale of prize-money.....	15
299. Section 1540, statement of proceeds of sales.....	38
300. Section 1541, statement of proceeds of sales.....	38
301. Section 1550, disbursements on foreign stations.....	62, 159
302. Section 1563, advances to distant stations.....	18, 28, 159
303. Section 1576, assignment of wages in naval service.....	13, 15, 26
304. Section 1576, quoted.....	15
305. Section 1624, art. 14, presenting false claims.....	22
306. Section 1741, allowance to widow of consular officer.....	271
307. Section 1752, diplomatic regulations.....	25
308. Section 1756, form of oath.....	346, 358
309. Section 1757, oath.....	346
310. Section 1758, who may administer oath.....	346
311. Section 1762, salaries, excess of.....	23
312. Section 1762, salaries to officers improperly holding over.....	22
313. Section 1762, salaries to officers improperly holding over.....	xxx
314. Section 1763, double salaries.....	19, 357
315. Section 1764, extra services.....	19
316. Section 1764, officers, clerks.....	361
317. Section 1765, extra allowances.. 16, 19, 28, 62, 147, 159, 263, 306, 307, 308, 309, 355, 356, 357, 358, 359, 360, 361	
318. Section 1765, quoted.....	307
319. Section 1766, arrearages.....	xxix
320. Section 1766, officers in arrears.....	325, 361
321. Section 1766, persons in arrears.....	xxix
322. Section 1766, quoted.....	361
323. Section 1768, suspension and filling vacancies.....	118
324. Section 1769, filling vacancies.....	119
325. Section 1770, term of office not extended.....	119
326. Section 1778, oaths and acknowledgments.....	15, 25, 190
327. Section 1778, oaths, acknowledgments.....	xxvii, xxviii
328. Section 1778, rights of citizens.....	342
329. Section 1779, civil action.....	342
330. Section 1781, procuring contracts.....	358
331. Sections 1781 and 1782, quoted from.....	358
332. Section 1782, illegal compensation.....	359
333. Section 1786, illegal holding of office.....	358
334. Section 1790, quoted.....	254
335. Section 1790, restrictions on payment for services.....	254, 255
336. Sections 1790, 3169, and 3171, quoted as to internal revenue inspection..	254
337. Section 1792, compensation from United States.....	22
338. Sections 1850, 1851, 1864, 1865, and 1907, quoted.....	149
339. Section 1850, Territorial laws.....	149
340. Section 1851, extent of legislative power.....	151
341. Section 1851, legislative power in Territory.....	149
342. Section 1851, legislatures of Territories.....	152
343. Section 1864, supreme court in Territory.....	115, 149, 150, 152
344. Section 1865, judicial districts in Territory.....	149
345. Section 1866, jurisdiction of courts.....	208
346. Section 1871, clerk of district court.....	153
347. Section 1874, judges of Supreme Court.....	153
348. Section 1875, district attorneys.....	115
349. Section 1876, marshals.....	112, 115

	Page.
<i>Revised Statutes—Continued.</i>	
350. Section 1880, salary of attorney.....	119
351. Section 1907, judicial power in Territory.....	149
352. Section 1910, jurisdiction of district courts.....	153
353. Section 1913, legislative assemblies in Territory.....	150
354. Section 1915, judges of supreme courts in Territories.....	150
355. Section 1918, legislative assemblies of Territories.....	150
356. Sections 1913, 1915, 1918, and 1934, quoted.....	150
357. Section 1934, supreme court, Arizona.....	150
358. Section 1951, disbursing officers in Territories.....	28, 62, 159
359. Section 1977, equal rights.....	342
360. Section 1980, conspiracy.....	342
361. Section 1981, preventing conspiracy.....	342
362. Section 1982, prosecutions.....	343
363. Section 1983, commissioners.....	89, 92, 343
364. Section 1984, executing warrants.....	92, 342
365. Section 1985, marshal.....	342
366. Section 1986, fees.....	342
367. Section 1987, fee, amount of.....	342
368. Section 1988, speedy trial.....	342
369. Section 1989, military and naval aid.....	342
370. Section 1990, peonage abolished.....	342
371. Section 1991, New Mexico, peonage.....	342
372. Section 1992, who are citizens.....	342
373. Section 1994, citizenship of married women.....	173, 342
374. Section 1995, Oregon.....	342
375. Section 1996, desertions.....	342
376. Section 1997, soldiers and sailors.....	342
377. Section 1998, avoiding the draft.....	342
378. Section 1999, expatriation.....	342
379. Section 2000, naturalized citizens.....	342
380. Section 2001, imprisoned citizens.....	342
381. Section 2002, armed troops.....	342
382. Section 2003, elections.....	342
383. Section 2004, right to vote.....	342
384. Section 2005, qualification for voting.....	342
385. Section 2006, penalties.....	342
386. Section 2007, prerequisite to voting.....	342
387. Section 2008, impeding voting.....	342
388. Section 2009, hindering voting.....	342
389. Section 2010, deprivation of office.....	342
390. Section 2011, opening court.....	342
391. Section 2012, supervisors of election.....	342
392. Section 2013, court kept open.....	342
393. Section 2014, district and circuit judges.....	342
394. Section 2015, construction.....	342
395. Section 2016, supervisors' duties.....	342
396. Section 2017, attendance at elections.....	342
397. Section 2018, counting ballots.....	342
398. Section 2019, challenging.....	342
399. Section 2020, molesting supervisors of elections.....	342
400. Section 2021, special deputies.....	342
401. Section 2022, duties of marshals.....	342
402. Section 2023, arrest.....	342
403. Section 2024, bystanders.....	342

Revised Statutes—Continued.

404. Section 2025, chief supervisors	342
405. Section 2026, duties chief supervisors.....	342
406. Section 2027, marshal to forward complaint.....	342
407. Section 2028, qualified voters.....	342
408. Section 2029, witnesses of voting	342
409. Section 2030, appointment of marshals.....	342
410. Section 2031, pay of supervisors	153, 342
411. Section 2032, acts continued in force.....	342
412. Section 2032, claims of colored soldiers, sailors, and marines.....	22
413. Section 2033, enforcing laws.....	342
414. Section 2034, expenditures	342
415. Section 2035, retained bounty fund.....	342
416. Section 2036, investing bounty fund	342
417. Section 2036, investments for colored soldiers	22
418. Section 2037, wife and children of colored soldiers.....	342
419. Section 2038, Freedman's Hospital.....	342
420. Section 2079, Indian treaties	370
421. Section 2103, assignment of contracts with Indians.....	15
422. Section 2106, assignment of contracts restricted	104
423. Section 2106, Indian contracts, assignment of.....	15
424. Section 2106, names of assignees.....	15
425. Section 2207, surveyors-general.....	158
426. Section 2215, bond of surveyor-general	158
427. Section 2234, registers and receivers.....	158
428. Section 2236, bond of register and receiver	158
429. Section 2256, land districts	158
430. Section 2279, pre-emptions	370
431. Section 2283, sale of lands, Kansas	371
432. Section 2285, pre-emptions	371
433. Section 2304, homesteads.....	371
434. Section 2436, sales, mortgages.....	15
435. Section 2517, collection districts	158
436. Section 2523, collector and surveyor	158
437. Section 2529, collection districts	158
438. Section 2536, collection districts.....	158
439. Section 2605, additional inspectors	158
440. Section 2606, weighers, gaugers, &c	158
441. Section 2608, appraisers	158
442. Section 2619, bonds of collectors, &c	158
443. Section 2620, bonds, how approved and filed.....	158
444. Section 2748, unexpended balance.....	339
445. Section 2834, bond of postmaster	158
446. Section 3141, collection districts.....	158, 242
447. Sections 3141 to 3145, quoted, as to collectors of internal revenue	242
448. Section 3142, collectors.....	158, 242
449. Section 3143, collectors' bonds.....	158, 242
450. Section 3144, collectors to be disbursing agents.....	28, 62, 159, 242, 302
451. Section 3145, compensation of collectors.....	242
452. Section 3152, agents	241, 242, 243, 246, 247, 250
453. Section 3152, frauds.....	253
454. Section 3169, malfeasance	254, 255
455. Section 3171, quoted.....	254
456. Section 3171, suits for damages.....	254, 255
457. Section 3220, refundment of taxes.....	211

Revised Statutes—Continued.

458. Section 3228, claims for refundment, limitation	208, 211
459. Section 3244, special taxes	129
460. Section 3309, distiller's return	315
461. Section 3426, quoted	138
462. Section 3426, replacing spoiled stamps	130, 131, 135, 138
463. Section 3426, spoiled stamps	129
464. Section 3436, medicines exempt	132
465. Section 3437, assessment unpaid tax	129, 130, 131
466. Section 3437, quoted from	131
467. Section 3463, detection and punishment of frauds	207, 242, 244
468. Section 3463, frauds	245, 250
469. Section 3463, quoted	244
470. Section 3477, assignments	17, 348
471. Section 3477, assignments, judgments	28
472. Section 3477, assignments of claims	13, 25, 190
473. Section 3477, assignment of claims void	XLII
474. Section 3477, certain assignments void	27
475. Section 3477, claims	16
476. Section 3477, construed by Supreme Court	16
477. Section 3477, corporations, assignments	14
478. Section 3477, money demands	19
479. Section 3477, powers of attorney, corporations	30
480. Section 3477, prohibiting assignments	125
481. Section 3477, quoted from	14, 125
482. Section 3477, transfers, acknowledgments	29
483. Section 3477, transfers and assignments	19
484. Section 3477, transfers, assignments, and powers of attorney	29, 125, 126
485. Section 3477, void assignments	23
486. Section 3477, void assignment	XXVIII
487. Section 3478, attorney, oath	22
488. Section 3478, claimant's oath	XXVIII
489. Section 3478, claims, prosecution of	XXVII
490. Section 3479, administering oath	XXVIII
491. Section 3479, who may administer oaths	XXVII
492. Section 3480, claims of disloyalists	22
493. Section 3499, mints, salaries	22
494. Section 3571, United States notes	167, 201
495. Section 3572, fractional currency	201
496. Section 3574, redemption of fractional notes	201
497. Section 3577, engraving and printing notes	348
498. Section 3578, expenses issuing notes	348
499. Section 3580, mutilated notes	166, 167
500. Section 3593, public moneys, drafts	16, 25, 35, 171
501. Section 3595, assistant treasurers	158, 187
502. Section 3600, bonds of assistant treasurers	158, 187
503. Section 3602, deputy assistant treasurer	158
504. Section 3603, officers, clerks, &c., in treasury in New York	158
505. Section 3612, officers, clerks, &c., in treasury in Cincinnati	158
506. Section 3614, bond of special agents	62, 66, 159, 302, 303
507. Section 3617, construction of	42
508. Section 3617, depositing moneys	37, 48, 49, 51
509. Section 3617, deposits	365, 366, 367, 368
510. Section 3617, gross proceeds of sales	38, 43
511. Section 3617, moneys deposited for sale of old material	41

Revised Statutes—Continued.

Page.

512. Section 3617, moneys to be deposited without deduction.....	53, 56, 212
513. Section 3617, receipts from custom duties and sales of land.....	43
514. Section 3618, construction of.....	40, 42
515. Section 3618, proceeds of sale of public property..	36, 37, 38, 42, 49, 53, 54, 57, 59
516. Section 3618, sales of old material.....	39, 41, 46, 48, 50, 51, 56, 58
517. Section 3618, sales of realty.....	52
518. Sections 3618 and 3692, regarding sale of old material	36
519. Section 3619, liability of officers or agents.....	44
520. Section 3619, quoted.....	44
521. Section 3620, depositing public money.....	35
522. Section 3620, disbursing officers.....	18, 32, 33, 61, 65
523. Section 3620, duty of disbursing officers.....	63, 86, 187
524. Section 3621, depositing money.....	63
525. Section 3622, accounts as to.....	xxviii, xxx
526. Section 3622, accounts.....	32, 159, 303, 352, 362, 397
527. Section 3623, distinct accounts.....	66
528. Section 3624, suits.....	66
529. Section 3625, distress warrant.....	159
530. Section 3639, custodians of public moneys.....	65, 158
531. Section 3641, transfer of postal deposits.....	128
532. Section 3644, public moneys in Treasury.....	128, 171
533. Section 3644, Treasurer's draft.....	16
534. Section 3645, presentment of drafts.....	23, 35, 63
535. Section 3645, regulations regarding drafts.....	35
536. Section 3646, authorizes duplicates for checks.....	32
537. Section 3646, duplicates for checks.....	18, 23, 62, 234
538. Section 3636, lost checks.....	28, 35, 159, 292
539. Section 3647, duplicate check of dead officer.....	23, 35
540. Section 3647, duplicate checks when officer who issued is dead.....	18, 32, 35, 234, 292
541. Section 3648, advances of public moneys.....	18, 28, 63, 96, 128, 159, 187, 303
542. Section 3648, fiscal agents.....	60
543. Section 3648, prohibiting advances.....	62
544. Section 3652, premium on sales of public moneys.....	35
545. Section 3652, premiums to be accounted for.....	35
546. Section 3654, compensation on disbursements.....	157
547. Section 3657, collectors, disbursing agents.....	155, 157, 159, 160, 162, 302
548. Section 3657, quoted.....	157
549. Sections 3657 and 3658 construed.....	160
550. Section 3658, quoted.....	157
551. Section 3658, special disbursing agents.....	28, 62, 63, 155, 157, 159, 160, 302
552. Section 3669, estimates to be submitted to Congress.....	213
553. Section 3672, sales of old material.....	58
554. Section 3672, statement of proceeds of sales.....	53
555. Section 3677, Department of Agriculture, disbursements.....	28
556. Section 3677, Department of Agriculture.....	62, 159
557. Section 3678, application of appropriations.....	214
558. Section 3679, appropriations, expenditures.....	99, 100
559. Section 3679, expenditures.....	348
560. Section 3679, no expenditures beyond appropriations.....	214
561. Section 3679, quoted.....	99
562. Section 3681, expenses, commissions.....	245
563. Section 3685, special appropriations.....	36, 49
564. Section 3688, public debt.....	171, 200

	Page
<i>Revised Statutes—Continued.</i>	
565. Section 3689, marine hospitals.....	40
566. Section 3689, permanent, indefinite appropriations.....	51, 292, 301
567. Sections 3689, 3692, 4803, and 4585, quoted.....	40
568. Section 3690, balances of appropriations.....	213
569. Section 3690, expenditure of balances.....	214, 220
570. Section 3691, disposal of balances.....	35, 200, 213
571. Section 3692, proceeds of sales.....	36, 38, 39, 43, 50, 51, 54, 55
572. Section 3692, sales, marine hospitals.....	40
573. Section 3693, payment in coin.....	200
574. Section 3695, cancellation of bonds.....	201
575. Section 3695, referred to.....	201
576. Section 3697, redemption of bonds.....	200
577. Section 3698, payment of interest.....	35, 200
578. Section 3700, purchase of coin.....	200
579. Section 3702, duplicate bonds.....	200, 201, 204
580. Section 3702, duplicate for bonds destroyed.....	200
581. Section 3703, indemnity for destroyed bonds.....	204
582. Section 3704, duplicate registered bond.....	204
583. Section 3705, indemnity for missing bonds.....	204
584. Section 3709, advertising for proposals.....	105
585. Section 3716, contracts, quartermaster's department.....	105
586. Section 3718, contract, naval supplies.....	105
587. Section 3721, purchases without advertisements.....	105
588. Section 3724, rejecting bids.....	105
589. Section 3726, supplies for the Navy.....	105
590. Section 3729, bunting, purchase of.....	105
591. Section 3732, authorized contracts.....	93, 98
592. Section 3732, quoted.....	98
593. Section 3732, quoted, as to contracts or purchases.....	199
594. Section 3732, unauthorized contracts prohibited.....	99, 100, 199
595. Section 3733, contracts, appropriations.....	99
596. Section 3733, contracts not to exceed appropriations.....	348
597. Section 3733, quoted.....	98
*598. Section 3737, assignment, transfer of contract annulled.....	6
599. Section 3737, construed.....	6
600. Section 3737, no transfer of contract.....	104, 348
601. Section 3737, quoted.....	15
602. Section 3739, Representatives, contract.....	359
603. Section 3740, contracts, Representatives.....	359
604. Section 3740, Representatives, interests of.....	359
605. Section 3741, Representative to have no interest.....	359
606. Section 3743, deposit of contracts.....	104
607. Section 3744, contracts to be in writing.....	104
608. Section 3760, Congressional Printer.....	93
609. Section 3765, interest in contracts.....	105
610. Section 3767, advertisements for paper.....	105
611. Section 3768, specifications for advertisements.....	105
612. Section 3777, assignments.....	xxvii
613. Section 3777, transfer of contract.....	15
614. Section 3779, engraving for Congress.....	93
615. Section 3780, engraving, advertising.....	94, 95, 96, 97, 98
616. Section 3780, engraving, when to be advertised.....	92, 105, 111
617. Section 3783, statement of proceeds of sales.....	38
618. Section 3823, advertising.....	310, 311, 312, 313

	Page.
<i>Revised Statutes—Continued.</i>	
619. Section 3823, publication of laws.....	309, 310
620. Section 3823, quoted	310
621. Section 3826, advertising.....	311
622. Section 3827, mail-route advertisements	105
623. Section 3829, post-offices.....	158
624. Section 3941, advertising.....	105, 309, 310, 311, 312, 313
625. Section 3941, quoted.....	311
626. Section 3957, changing terms of contract	105
627. Section 3958, as to contracts.....	4
628. Section 3962, deductions from pay of contractors.....	9
629. Section 3963, construed	6
630. Section 3963, mail contracts not assignable	5, 104, 125
631. Section 3963, makes null and void assignments of contracts.....	6
632. Section 3963, quoted from.....	125
633. Section 4017, special agents, compensation.....	158
634. Section 4046, embezzlement of money order.....	35
635. Section 4046, money order embezzlement	23
636. Section 4055, payments on account of postal service.....	4
637. Section 4339, papers for vessels in whale fishery	159
638. Section 4341, fees.....	56
639. Section 4535, loss of seaman's lien	15
640. Section 4545, unclaimed seamen's wages.....	40
641. Section 4569, medicines.....	40
642. Section 4577, quoted.....	139
643. Section 4577, return of seamen	139
644. Section 4578, penalty for refusing to receive seamen.....	26
645. Section 4585, seamen's contribution for hospitals.....	40
646. Section 4586, hospital dues of vessels sold abroad.....	40
647. Section 4643, assignments of prize money.....	15
648. Section 4667, light-house, contract.....	105
649. Section 4673, light-house keeper.....	308
650. Section 4675, statement of proceeds of sales.....	38
651. Section 4764, vouchers of pension agents	187
652. Section 4764, vouchers to pensioners	158
653. Section 4765, check of pensioner	23
654. Section 4765, check to order of pensioner	35, 63, 158, 187
655. Section 4778, pension agents.....	115, 158, 187
656. Section 4779, bond of pension agents.....	158
657. Section 4780, pension agencies	158, 187
658. Section 4801, hospitals for seamen.....	39
659. Section 4801, marine hospitals	49
660. Section 4801, and 4802, quoted	40
661. Section 4802, marine hospitals	39
662. Section 4802, supervising surgeon of marine-hospital service.....	49, 51
663. Section 4803, custody of fund for relief of disabled seamen.....	51
664. Section 4803, disabled seamen.....	49, 50
665. Section 4803, tax upon seamen.....	40
666. Section 4806, marine hospital, advertising.....	37
667. Section 4806, marine hospitals	54
668. Section 4806, sale of marine hospitals.....	40, 56
669. Section 4839, hospital for insane.....	28
670. Section 4839, superintendent of Government hospital.....	62, 302
671. Section 4845, admission to hospital.....	15
672. Section 5182, national bank notes	168

	Page.
<i>Revised Statutes—Continued.</i>	
673. Section 5184, national bank notes	167
674. Section 5331, treason.....	161
675. Section 5334, rebellion	161
676. Section 5413, obligations of United States.....	35
677. Section 5413, securities defined.....	63
678. Section 5413, securities of United States.....	35
679. Section 5414, forging or counterfeiting	35
680. Section 5438, conspiracy to defraud.....	xxx
681. Section 5438, false claims.....	22, xxviii
682. Section 5450, bribery of Representatives.....	359
683. Section 5451, bribery of officers.....	359
684. Section 5454, unlawfully taking papers relating to claims.....	22
685. Section 5481, extortion.....	347
686. Section 5482, illegal fees.....	347
687. Section 5483, receipting for larger sums than are paid.....	xxviii, xxx, 347
688. Section 5484, extortion by informers.....	347
689. Section 5485, more than legal fee.....	347
690. Section 5486, embezzlement.....	347
691. Section 5487, pension agent taking a fee.....	347
692. Section 5488, disbursing officers.....	87
693. Section 5488, misconduct of disbursing officer.....	187, 347
694. Section 5489, misconduct of Treasurer.....	347
695. Section 5490, misconduct of custodian of public money	347
696. Section 5491, failure to render accounts.....	347
697. Section 5491, officers' accounts	32
698. Section 5492, failure to deposit.....	347
699. Section 5493, public money	347
700. Section 5494, evidence of embezzlement	347
701. Section 5495, <i>prima facie</i> evidence	347
702. Section 5496, evidence of conversion.....	32, 347
703. Section 5497, unlawfully receiving, &c	347
704. Section 5498, construed	19
705. Section 5498, misconduct regarding claims.....	347
706. Section 5498, officers interested in claims.....	19, 359
707. Section 5498, officers prosecuting claims.....	22
708. Section 5499, judge accepting bribe	347
709. Section 5500, Representative accepting bribe.....	347
710. Section 5501, officer accepting bribe.....	347
711. Section 5502, forfeiture of office	347
712. Section 5503, contracting beyond appropriation.....	347
713. Section 5504, failing to deposit money.....	347
714. Section 5505, receiving loan or deposit.....	347
715. Section 5595, what the Revised Statutes embrace	311, 335
716. Section 5596, repeal of acts embraced in revision.....	45
717. Section 5600, legislative construction, presumption of.....	42
718. Title XIII, chap. 16, compensation of marshals	90
719. Use of word "claims" in	22
720. When meaning plain, recurrence to original statutes not to be had.....	42

Revised Statutes Construed—

1. The professional retainer of a member of Congress under sections 366; and 366 is not a contract within the meaning of sections 3739-3742..... 355

Revised Statutes (District of Columbia)—

1. Section 92, laws of Maryland
2. Section 750, supreme court.....

195
308

	Page.
<i>Revised Statutes (District of Columbia)—Continued.</i>	
3. Section 928, copy of decree.....	308
4. Section 976, unadministered assets	195
5. Section 1079, fines, costs.....	260, 263
6. Sections 1079 and 1174, as to lotteries.....	260
7. Sections 1079 and 1174, quoted	260
8. Section 1080, judgments, salaries.....	263
9. Section 1080, quoted from; as to judgments.....	264
10. Section 1174, as to payment of informer's moieties	xii
11. Section 1174, sale of lottery tickets.....	260, 262
<i>Revision—</i>	
1. As to Departments, action of court, subject to	xxxv
<i>Revoking Draft—</i>	
1. Before actual payment, mode of.....	xxviii
<i>Revolutionary Claims—</i>	
1. Volume compiled regarding.....	21
<i>Rewards—</i>	
1. To informers	207, 244
<i>Reynolds, R. M.—</i>	
1. First Auditor, account of Hoen & Co. adjusted by.....	95
<i>Rheem's Case.....</i>	*305
<i>Rheem, C. B.—</i>	
1. Party in Rheem's case	306
<i>Richardson, Judge—</i>	
1. As to powers to revoke orders and decrees of courts.....	xxxii
2. Quotation from, as to duties and powers of auditors.....	xvii
<i>Richardson's Supplement—</i>	
1. To Revised Statutes	264
<i>Richardson, William A.—</i>	
1. Secretary, letter of, as to refund of taxes	276
<i>Right—</i>	
1. Cannot be forfeited without judicial proceedings	8
2. Of a <i>de facto</i> officer to recover fees from private parties.....	119
3. Of an incumbent holding over to compensation after his term of office expires, if allowed, effect of	114
4. Of appeal, as to the	xxi
5. Of holder of half a bond to payment thereof	200
6. Of husband to transfer personal estate of wife	174
7. Of widow of contestant	328
8. To claim or demand	20
9. To payment of drafts	241
10. To receive compensations for two positions	305
11. To receive salary.....	19
12. To seat and compensation as member of House of Representatives.....	321
<i>Rightful Claimant—(See Claimant.)</i>	
<i>Rights—</i>	
1. As to determination of individuals	xvii
2. Civil and political, as to.....	342
3. Of administrator	183
4. Of adverse parties, as to registered bonds.....	286
5. Of all parties, when concluded	181
6. Of attorneys, &c., as to	xxvii
7. Of creditors	191
8. Of Government under contracts	102
9. Of married persons in Sweden.....	172

	Page.
<i>Rights—Continued.</i>	
10. Of parties before any performance of contract.....	102
11. Of parties in particular cases	xLII
12. Of parties under acts of Congress.....	170
13. Of parties under an informal indorsement in full.....	188
14. Of parties under post-nuptial contract.....	175
15. Of payee in registered bonds	291
16. Of purchaser as to registered bonds	296
17. Of purchasers of Treasury notes	287
18. To be enforced by executive authority, as to.....	xxiii
<i>Rival Claimants—</i>	
1. As to determination of rights of	xxxiv
2. As to disputed titles to land	xli
<i>Roll of Membership—</i>	
1. In House.....	323
<i>Rule—</i>	
1. Against assignments.....	34
2. As between United States and depositary.....	188
3. In courts as to rights; foreign guardians	171
4. In equity, the.....	146
5. In Treasury Department as to foreign guardians.....	171
<i>Rule of Reason—</i>	
1. As to permanent specific appropriation.....	339
<i>Rule of the House—</i>	
1. As to appropriations	339
<i>Rule of the Senate—</i>	
1. As to appropriations.....	338
<i>Rules and Regulations—</i>	
1. As to.....	242
2. As to public health.....	223
<i>Rules—</i>	
1. Do not always apply to Government which apply between private citizens	12
2. Of House of Representatives	362
<i>Rulings—</i>	
1. Of presiding officers of Congress as to extra pay	364
<i>Running Accounts—</i>	
1. With erroneous payments as to conclusiveness of Comptroller's balance.	xxxii
<i>Running Time—(See Schedule Time.)</i>	
<i>Saint Elizabeth Hospital Case</i>	57
<i>Saint Helena—</i>	
1. As to school farms.....	339
<i>Saint Luke—</i>	
1. As to school farms.....	339
<i>Salaries—</i>	
1. As to assignment of.....	xx
2. As to public schools.....	306
3. Due officers used as set-off against claims due from.....	22
4. Of Army officers, claims for.....	13
5. Of ministers, consuls, and commercial agents abroad.....	13
6. Of officers and employés of board of health.....	221
7. Of officers in Washington, payment of, under power of attorney.....	23
8. Of officers of the United States, jurisdiction of courts over.....	21
9. Of officers, payment of	13
10. Of officials connected with public schools.....	306

Page.

Salaries—Continued.

11. Of postmasters, as to adjustment of	xxi
12. Of registers and receivers	369
13. Of some officers commence when they enter upon the performance of duties (see 4 Opinions Attorney-General, 123)	215
14. Paid by disbursing officers, as to	xxvii
15. Paid by marshal of District of Columbia	264
16. Treated as claims	22
17. When two, may be received	307

Salary—

1. Account of, in Garnet's case	271
2. Allowed district attorneys in Territories, act February 27, 1813	119
3. Allowed district attorneys in the United States in act March 3, 1841 ...	119
4. And compensation of member of Congress, as to	322
5. And fees incident to title of an office	116
6. And fees of district attorney, where payable	120
7. And mileage, claim of widow of Congressman to	330
8. As Representative, requisites to drawing	329
9. As to residue of years	270
10. As to substitutes	348
11. As to title to	270
12. Construction of statute as to	329
13. Construction of statute regarding	19
14. Due a public employé, amount of	280
15. Due by law, disposition of balance of	280
16. Effect of oath as to	328
17. For continuing service cannot be assigned	34
18. Future assignment of, by public officer, void	14
19. Of a messenger	280
20. Of Congressman, amount of	329
21. Of Representative, as to	328
22. Of some offices decreased	215
23. Recovery of, when unlawfully paid	321
24. Right to payment thereof	270
25. Substitute to receive part of clerk's	345
26. Testamentary disposition of	270
27. Unlawful payment of	321
28. When to begin	214

Sale—

1. Effect and meaning of	58
--------------------------------	----

Sales—

1. Of old material, gross proceeds of	36
---	----

Sales of Land—

1. Expenses of	365
2. Letter of Commissioner of General Land Office as to	365

Sale of Lands—

1. Adjustment of accounts as to	369
2. Disposition of net proceeds of	367

<i>Sanborn's Case</i>	205
-----------------------------	-----

Sanborn—

1. May be required to refund money paid him	210
---	-----

Sanborn, John D.—

1. Legal duty and liability of, as to moieties	212
2. Party in Sanborn's case	206

	Page.
<i>Sanitary Information—</i>	
1. Collection of	226
<i>Sanitary Organizations—</i>	
1. As to public health	226
<i>Sanitary Stores—</i>	
1. And supplies to boards and stations	221
<i>Schedule A—</i>	
1. (Medicines or preparations) quoted	137
2. Section 3477 Revised Statutes, quoted from	131
<i>Schedule of Claims—</i>	
1. Allowed by Second Comptroller	266
2. For refund of taxes	276
3. Growing out of illness and burial of late President Garfield	380
<i>Schedule Time—</i>	
1. As to carrying mails	2
<i>School Farms—</i>	
1. As to direct-tax sales	339
2. Proceeds of sales of	340
<i>School Trustees—</i>	
1. In District of Columbia	305
<i>Seal—</i>	
1. As to power of attorney on draft	190
2. Municipal and corporate bonds not affected by addition of a	203
<i>Sealed Instrument—</i>	
1. Requires sealed authority to make or change it	203
<i>Seaman Relief Case</i>	138
<i>Seaman—</i>	
1. American, relief of, by consular office	139
<i>Seat of Government—</i>	
1. Term of court in Territorial	152
<i>Second Auditor—</i>	
1. May appoint a deputy	73
<i>Second Comptroller—</i>	
1. Adjusts and certifies accounts of pension agents	185
2. Authorized and directed to act in place of First Comptroller	283
3. Claims allowed by	266
4. Decision of Hon. Hiland Hall as to powers of Sixth Auditor	13
5. May appoint a deputy	73
<i>Secretary of State—</i>	
1. Authority of	144
2. Designated to pay twenty thousand dollars expenses of Yorktown Centennial Anniversary	141
3. Discretionary authority of	142
4. Invested with general power	141, 145
5. To approve prices of articles and objects of expenditure	143
<i>Secretary of the Interior—</i>	
1. As to distribution of reports of the decisions of the Supreme Court	299
2. Consent of, as to assignment of contract with Indians	15
3. Letter of, as to sales of land	365
<i>Secretary of the President—</i>	
1. Authorized by special law to sign the President's name to land-warrants	83
<i>Secretary of the Senate—</i>	
1. Payment by, of messenger's salary	280

Secretary of the Treasury—

1. Appointment of disbursing agents by	155
2. As to control of, over National Board of Health	225
3. As to counter-signature of warrants drawn by	xx
4. As to substitute and leaves of absence	345
5. Authority and duty of	245
6. Authority and duty of, under loan acts	203
7. Authority and responsibility of, in issuing bonds	179
8. Authority of, as to clerks	219
9. Authority of, over Marine Hospital fund	54
10. Authority of, to appoint clerks as investigators	241
11. Authority of, to redeem United States bonds	200
12. Authority to employ informers	207
13. Authorized to pay moieties to informers, act July 13, 1866	212
14. Authorizing Joseph Addison Thomson to perform duties of Deputy First Comptroller	285
15. Compensation of employes fixed by	219
16. Control of, over accounts	xxxviii
17. Control of, over claims	xxxviii
18. Duty of, as to accounting officers	xxxv
19. Duty of, as to set-off	208
20. Forbidding assignment of accruing salary	17
21. Issues warrant for payment of claim	16
22. Letter of, as to colonization	332
23. Letter of, as to indorsements	192
24. Letter of, as to refunding taxes	275
25. Letter of, as to sale of old material	46
26. May delegate officer in office of First Comptroller to perform duties of Deputy First Comptroller	285
27. Need not himself examine or draw warrant	82
28. Opinion by, as to permanent legislation	305
29. Powers of delegation granted to	67
30. Power of, to designate disbursing agents	158
31. Public depositories authorized by the	187
32. Regarding delegation of power to sign warrants	61
33. Regulations of, as to registered bonds	286
34. Regulations prescribed by, for the conduct of clerks	251
35. Relieved from signing certain warrants	67
36. Report of, on finances, 1857	64
37. Responsibility of, as to issuing warrants	xxi
38. Signature of, makes a warrant a lawful instrument	82
39. Warrants drawn by	67

Secretary of War—

1. Action of, as to drafts drawn by army contractors	127
2. As to intercourse with Indian tribes	248
3. Authority to direct expenditure of money appropriated to erect monu- ment at Yorktown	141

Secret Service Division—

1. Persons employed in	219
2. Payment of persons employed in	219

*Section.—(See Revised Statutes; Act.)**Securities—*

1. Circumstances and considerations governing indorsements by husband ..	173
2. Payment of negotiable public	171

	Page.
<i>Security—</i>	
1. For payment of subcontractor for carrying mails.....	2
<i>Seizures—</i>	
1. Remedy in cases of.....	XXXVIII
<i>Select Committee—</i>	
1. To audit expenses incident to illness and burial of late President Garfield.....	378
<i>Senate—</i>	
1. As to confirmations by.....	XXXIII
2. Of the United States, advice and consent of, necessary in certain cases.....	115
3. Rule of, as to appropriations.....	338
<i>Senator—</i>	
1. Not a civil officer.....	358
<i>Senators—</i>	
1. As to compensation of.....	XXX
<i>Separate schedules—</i>	
1. Of accounts of disbursing officers.....	398
<i>Sergeant-at-Arms—</i>	
1. Action of, as to deceased contestant.....	328
<i>Service—</i>	
1. As to transportation of mails.....	1
2. Expedited, decreased, curtailed, or diminished, as to carrying mails....	2
3. Fees prescribed by statute for each.....	163
4. Funds for Marine Hospital.....	50
5. Reorganizing the diplomatic and consular.....	25
<i>Services—</i>	
1. And liabilities for which appropriations are made.....	220
2. By whom rendered.....	346
<i>Services Rendered—</i>	
1. Schedule A, as to illness and burial of late President Garfield.....	320
<i>Sessions—</i>	
1. Of Territorial courts.....	120
<i>Set-off—(See Accord and Satisfaction, Payment, Salary.)</i>	
1. Against party indebted to the United States.....	205
2. As to authority to make.....	325
3. As to forfeiture in contract for carrying mails.....	4
4. As to satisfaction of balance by.....	XXXIII
5. Legal proceedings as to.....	205
6. Practice of Departments as to.....	XXIX
7. Practice of Treasury Department stated as to.....	206
8. Salaries of officers used as.....	22
<i>Set-offs—</i>	
1. Jurisdiction of Court of Claims as to.....	XXIX
2. Jurisdiction of Departments in relation to.....	XXIX
<i>Settled Accounts—</i>	
1. As to tribunals required to examine.....	XXVI
<i>Settlement—</i>	
1. As to corrections before final.....	XXXII
2. Of account of mail contractor.....	1
3. Of accounts by Sixth Auditor.....	4
4. Of claims and demands against the United States.....	XVII
5. Of consular accounts.....	349
6. Of pension agents' accounts.....	187
7. Of property to separate use of wife.....	170
8. Of subcontractor's account an element in that of the contractor.....	6

Settlements—

1. Made by Sixth Auditor, appeals from..... **xxi**

Settler's claim—

1. As to..... **20**

Shakespeare—

1. Quoted as to inheritance..... **19**
2. Quoted from, regarding claims..... **19**

Shares—

1. In corporations, assignment of..... **295**

Shelley's Case..... **321****Shelley, Charles M.—**

1. Party in Shelley's case..... **321**

Sheriff—

1. Office and duties of..... **74**

Shipwreck—(See Contingent Expenses of Consulates.)**Signature—**

1. As to a..... **82**
2. By stamp or copper-plate impression..... **68**
3. On warrant, discussion as to..... **68**

Signatures—

1. As to indorsements..... **189**

Signing—

1. Meaning of word..... **68**

Silver Certificates—

1. Redemption of..... **167**

Simple Contract Debts—

1. Assets where debtor resides at testator's death..... **235**

Sinking Fund—

1. Bonds applied to..... **201**

Situs—

1. Of Government bonds at domicile of owner..... **178**
2. Of property follows personal domicile of owner..... **235**
3. Of Treasury drafts..... **233**
4. Or domicile..... **168**

Sixth Auditor—

1. Action of, in Walsh's case affirmed..... **128**
2. Appeals from..... **5**
3. Appeal to First Comptroller from..... **1**
4. As to advertising proposals..... **309**
5. As to appeals from..... **xix**
6. As to decisions by..... **xvii**
7. As to, in cases of appeal..... **xxvii**
8. Authority to certify sum due subcontractor..... **4**
9. Authority of, to determine amounts due from contractor and subcontractor..... **12**
10. Authorized to retain forfeiture from subcontractor for failure in contract to carry mails..... **1**
11. Extent of powers of..... **13**
12. Is a comptroller also..... **12**
13. Is his own comptroller..... **xxvii**
14. Is not concluded by amount approved by officers of Post-Office Department..... **1**
15. Jurisdiction of First Comptroller over appeals from..... **xx**
16. Letter of, as to pay-drafts..... **123**
17. Notice to, of filing of subcontracts for carrying mails..... **7**

	Page.
<i>Sixth Auditor—Continued.</i>	
18. Not subject to decisions and orders of Post-Office Department.....	4
19. Power of to determine amount due contractors.....	4
20. Rights, duties, and powers of.....	12
<i>Slavery—</i>	
1. Saving the Union with.....	337
<i>Small-pox—</i>	
1. Prevention of spread of.....	222
<i>Smith's Case.....</i>	362
<i>Smith, Henry H.—</i>	
1. Journal Clerk of House, letter of, as to extra pay for preparing digest..	362
<i>Smith, James Q.—</i>	
1. Party in Shelley's Case.....	321
<i>Snuff—</i>	
1. As to.....	253
<i>Snyder, William Tayloe—</i>	
1. Party in Tayloe's case.....	191
<i>Soldiers and Sailors—</i>	
1. Sales of lands to.....	334
<i>Soldiers—</i>	
1. Bill giving public lands to, introduced by Hon. William Lawrence, referred to.....	370
<i>Solicitor-General Phillips—</i>	
1. As to valid and binding contracts.....	102
<i>Solicitors—</i>	
1. As to.....	xxvii
<i>Sovereignty—</i>	
1. Principle of, as to assignments.....	234
<i>Speaker of House of Representatives—</i>	
1. As to.....	22
2. Certificate of.....	328
3. Claims referred to.....	207
4. Conclusiveness of certificate of.....	328
<i>Special Agent—</i>	
1. And inspectors of internal revenue.....	242
<i>Special Agents—(See Agents; Collectors; Disbursing Clerks; Disbursing Officers.)</i>	
1. Appointment of.....	302
2. Charged with disbursement of public moneys.....	302
3. Clerks as.....	241
<i>Special Authority—</i>	
1. Effect of exercise of, by executive officer	xxx
<i>Special Detail—</i>	
1. Of clerks.....	251
<i>Special Disbursing Agent—</i>	
1. Compensation of	159
<i>Special Election—</i>	
1. To fill vacancy as Representative	322
<i>Special Power—</i>	
1. Effect of exercise of.....	xxxi
2. Grant of, to be construed strictly.....	60, 63
<i>Special Provision—</i>	
1. Clause making	228
2. In a statute.....	309
<i>Special Service—</i>	
1. Detail to.....	249

	Page.
<i>Special Taxation—</i>	
1. Of courts.....	155
<i>Special Tribunal—</i>	
1. Authority of.....	xxv
<i>Special Trust—</i>	
1. Referred to in section 3648, Revised Statutes.....	60
2. Relating to land.....	197
<i>Specialty Debts—</i>	
1. Assets where the instrument is.....	235
<i>Specific Funds—</i>	
1. As to appropriations.....	337
<i>Specific Performance—</i>	
1. Of assignment.....	286
2. Of contracts.....	288
<i>Specific Provisions—</i>	
1. Of one statute control general provisions of another.....	365
<i>Speech—</i>	
1. In Congress by William Lawrence, January 13, 1870, as to reconstruction of Virginia.....	343
2. In Congress by William Lawrence, March 21, 1868, as to Indian lands..	369
<i>Spencer, John W.—</i>	
1. Party in False-Description case	265
<i>Spirits and Bitters—</i>	
1. Enumerated as articles subject to stamp tax.....	134
<i>Spirits—</i>	
1. As to.....	130
2. As to number of gallons produced	395
3. Inspection of.....	252
4. Tax of	131
<i>Stamps—</i>	
1. Unnecessarily used	129
2. Used on packages of whisky	134
<i>Stamp Tax—</i>	
1. As to refunding.....	129
2. Liability to	132
3. When article is subject to	134
<i>Stare Decisis—(See Res Adjudicata.)</i>	
1. As to law of.....	xxx
<i>Star Route—</i>	
1. Mail service, contracts for.....	2
<i>Star Service—</i>	
1. As to contracts for carrying mails.....	6
<i>State and Local Boards—</i>	
1. Of health, aid of.....	228
<i>State—</i>	
1. As to charging of, by Comptroller with a liability	xxxii
2. Jurisdiction of, as to control of property.....	234
3. May prescribe remedy where it is itself a party.....	236
4. Right of to administer on property within its jurisdiction.....	235
<i>State Governments—</i>	
1. Reorganization of.....	344
<i>Statement—</i>	
1. Monthly, of deposit account.....	187

	Page.
<i>Statements—</i>	
1. Made as to sales of land.....	369
2. Of work performed in Treasury Department, as to.....	IX
<i>State Papers—</i>	
1. Referred to regarding claims.....	21
<i>State Statute—</i>	
1. Force of.....	166
<i>States—</i>	
1. As to the laws of the several.....	XXII
2. Conditions precedent to donations of money by Congress.....	331
3. Control and jurisdiction of, as to property.....	235
4. Reconstruction of.....	343
<i>Stationery—(See Contingent Expenses.)</i>	
<i>Stationery—</i>	
1. As to.....	299
<i>Statute—</i>	
1. A case may be within the letter of, though not within its purpose.....	6
2. A case may be within the purpose of, which is not within its letter.....	6
3. Affirmative, may by implication negative that which has been given by another affirmative.....	152
4. Against jobbing.....	438
5. Application of, to fees of officers of Utah Territory.....	120
6. Arranging terms of Territorial supreme court.....	151
7. As to contract for services.....	345
8. As to effect of intention in, over prior.....	365
9. As to employment and payment of officers and employés.....	345
10. Authorizing replacement of mutilated United States notes.....	167
11. Conflicting provisions in, as to refunding taxes.....	274
12. Construction of.....	6
13. Construction of, by executive officers.....	36
14. Construction of, regarding salary.....	19
15. Declarations of, regarding void assignments.....	29
16. Directory or mandatory.....	100, 126
17. Effect of modification of.....	153
18. Effect of particular provisions in.....	155
19. Giving power to legislative assembly.....	151
20. In relation to assignment of claims.....	15
21. Interpretation of, by long usage.....	357
22. Limiting includes in itself a negative.....	162
23. Making appropriations for claims growing out of illness and burial of late President Garfield.....	384
24. Making powers of attorney void.....	24
25. Modes of repealing.....	260
26. More than one on the same subject.....	36
27. Original jurisdiction of auditing offices defined by.....	XXVI
28. Places powers of attorney on same footing as assignments.....	30
29. Power given by.....	151
30. Powers executed in contravention of.....	14
31. Presumption of intended change of, law.....	365
32. Provisions of, as to repeal by implication.....	331
33. Purpose of.....	17
34. Purpose must prevail over letter of.....	6
35. Recitation in the preamble of.....	320
36. Regarding sale of old material.....	36
37. Regulating issue of duplicate drafts and checks.....	23

Page.

Statute—Continued.

38. Regulation of practice and jurisdiction as to set-offs.....	XXIX
39. Repealing policy of, by subsequent statute.....	331
40. Requirement of, regarding the examination and certification of accounts by the court.....	114
41. Retroactive, effect of.....	216
42. Specific provision in.....	36
43. When not mandatory.....	274
44. When superseded.....	331

Statutes—

1. Adhering to construction.....	48
2. Against assignments considered.....	18
3. Application of the rule of construing.....	119
4. Application of, to Government.....	239
5. As to constitutional validity of.....	XXVI
6. As to construction of.....	XXIII
7. As to incidents and intendments.....	246
8. Authorizing issue of bonds.....	201
9. Classes of, as to prescribing regulations.....	242
10. Construction of.....	225, 296
11. Duty of judicial and executive officers as to construction of.....	XXV
12. Duty of those required to construe.....	368
13. Each of two like, should have an effect and a separate purpose.....	160
14. Effect of constitutional, in construing them.....	XXVI
15. Effect of regulating the emoluments of the district attorney of Utah Ter- ritory.....	119
16. Enacted by Congress, States, and Territories, as to.....	XXVI
17. Exceptions in, not to be enlarged by inference.....	14
18. Executive constructions of.....	XXIII
19. Fixing rights of holders of bonds.....	201
20. Force of intention in construing.....	280
21. Giving jurisdiction over Departmental matters to courts.....	XVI
22. In relation to office of reporter of Supreme Court.....	299
23. Must rest on the words used.....	159
24. Prescribing mode of redemption on bonds.....	201
25. Rule in construction of.....	228

Statutes at Large—

1. Vol. 1, p. 37, deputy officers.....	72
2. Vol. 1, p. 49, principal and agents.....	72
3. Vol. 1, p. 65, Treasury Department.....	67, 72
4. Vol. 1, p. 76, Supreme Court.....	299
5. Vol. 1, p. 87, deputy officers.....	72
6. Vol. 1, p. 87, duty of marshal.....	89
7. Vol. 1, p. 87, marshal, sheriff.....	75
8. Vol. 1, p. 91, jurisdiction of commissioners.....	89
9. Vol. 1, p. 92, trials at common law.....	XXII
10. Vol. 1, p. 112, treason, rebellion.....	52
11. Vol. 1, p. 232, deputy officers.....	72
12. Vol. 1, p. 245, administration; treaties.....	237
13. Vol. 1, p. 276, mileage for marshals.....	89
14. Vol. 1, p. 280, assignment of soldiers' pay.....	13
15. Vol. 1, p. 280, pay assignments.....	27
16. Vol. 1, p. 334, jurisdiction of commissioners.....	89
17. Vol. 1, p. 335, return of process.....	89
18. Vol. 1, p. 425, marshal, sheriff.....	75

	Page.
<i>Statutes at Large—Continued.</i>	
19. Vol. 1, p. 605, hospital fund.....	40
20. Vol. 1, p. 610, contracts	104
21. Vol. 1, p. 624, marshals' fees, limitation	165
22. Vol. 2, p. 103, District of Columbia.....	195
23. Vol. 2, p. 203, Marine Hospital fund.....	40
24. Vol. 2, p. 678, commissioners.....	92
25. Vol. 2, p. 679, jurisdiction of commissioners	89
26. Vol. 2, p. 758, administration	231
27. Vol. 2, p. 758, claims, suits.....	181
28. Vol. 2, p. 758, drafts, administrators	234
29. Vol. 2, p. 758, suits, administration	236
30. Vol. 2, p. 806, salary of attorney	119
31. Vol. 3, p. 350, jurisdiction of commissioners	89
32. Vol. 3, p. 392, claims, adjustment of.....	xxxix
33. Vol. 3, p. 516, civilization fund.....	371
34. Vol. 4, p. 246, claim, set-off, salary.....	22
35. Vol. 4, p. 602, advertising contracts, appropriations.....	100
36. Vol. 4, p. 753, Delaware Breakwater	298
37. Vol. 5, p. 31, claim, salary, set-off.....	22
38. Vol. 5, p. 349, branches of the public service	361
39. Vol. 5, p. 427, salaries, district attorneys	119
40. Vol. 5, p. 453, land grants.....	370
41. Vol. 5, p. 510, branches of the public service	361
42. Vol. 5, p. 516, issue of process.....	89
43. Vol. 5, p. 524, Supreme Court	299
44. Vol. 5, p. 525, officers, clerks.....	361
45. Vol. 5, p. 536, style and title of acts	335
46. Vol. 5, p. 545, publishing reports of Supreme Court.....	300
47. Vol. 5, p. 545, reporter of Supreme Court.....	300
48. Vol. 5, p. 545, Supreme Court	299
49. Vol. 5, p. 877, signatures.....	69
50. Vol. 9, p. 1, evidence.....	283
51. Vol. 9, p. 4, orphans' courts, District of Columbia.....	195
52. Vol. 9, p. 41, assignments void.....	23
53. Vol. 9, p. 41, claims, assignment of.....	xlii
54. Vol. 9, p. 41, officer, claim.....	19
55. Vol. 9, p. 41, prohibiting assignments	128
56. Vol. 9, p. 59, disbursements.....	65
57. Vol. 9, p. 59, draft, public moneys	402
58. Vol. 9, p. 171, disposition of proceeds of sale.....	48
59. Vol. 9, p. 171, proceeds of sales	45
60. Vol. 9, p. 171, sale of condemned clothing.....	38
61. Vol. 9, p. 395, signatures	69
62. Vol. 9, p. 396, Assistant Secretary.....	67
63. Vol. 9, p. 398, gross amount of proceeds for sale of public property.....	38
64. Vol. 9, p. 398, moneys recovered on information.....	212
65. Vol. 9, p. 398, receipts	43
66. Vol. 9, p. 449, courts, legislature	152
67. Vol. 9, p. 466, land grants.....	370
68. Vol. 9, p. 507, proceeds of sale.....	38, 45
69. Vol. 9, p. 507, sales of Government property	44
70. Vol. 10, p. 100, double salaries	357
71. Vol. 10, p. 161, fees and costs.....	119, 120
72. Vol. 10, p. 164, compensation of marshals.....	90

	Page.
<i>Statutes at Large—Continued.</i>	
73. Vol. 10, p. 164, return of process.....	88
74. Vol. 10, p. 169, fees and costs	120
75. Vol. 10, p. 170, assignment of claims	XLII
76. Vol. 10, p. 170, misconduct in office	359
77. Vol. 10, p. 170, officer prosecuting claim.....	19
78. Vol. 10, p. 170, preventing frauds.....	23
79. Vol. 10, p. 170, prohibiting assignments	128
80. Vol. 10, p. 171, claims	19
81. Vol. 10, p. 171, misconduct in office.....	359
82. Vol. 10, p. 209, chief clerk's duties	249
83. Vol. 10, p. 244, land grants.....	370
84. Vol. 10, p. 423, contracts.....	108
85. Vol. 11, p. 49, accounts, compensation.....	154
86. Vol. 11, p. 49, attorneys, supervisors	153
87. Vol. 11, p. 249, public revenue disbursements	63
88. Vol. 11, p. 249, section 1, disbursing officers, checks from ..	33
89. Vol. 11, p. 327, public buildings.....	157
90. Vol. 11, p. 365, coupon bonds	425
91. Vol. 12, p. 79, bonds, securities.....	201
92. Vol. 12, p. 79, coupon bonds.....	425
93. Vol. 12, p. 79, loans	203
94. Vol. 12, p. 79, registered bonds.....	287
95. Vol. 12, p. 121, Treasury notes	287
96. Vol. 12, p. 129, bonds, securities.....	201
97. Vol. 12, p. 129, loans.....	203
98. Vol. 12, p. 129, registered bonds	287
99. Vol. 12, p. 178, bonds, securities	201
100. Vol. 12, p. 178, loans.....	203
101. Vol. 12, p. 178, quoted from	293
102. Vol. 12, p. 178, registered bonds.....	287, 293
103. Vol. 12, p. 220, contracts, advertising	105
104. Vol. 12, p. 259, bonds	287
105. Vol. 12, p. 259, bond securities.....	201
106. Vol. 12, p. 259, loans	203
107. Vol. 12, p. 259, quoted from.....	287, 290
108. Vol. 12, p. 259, registered bonds	290
109. Vol. 12, p. 269, bonds	286
110. Vol. 12, p. 304, direct tax	331, 339
111. Vol. 12, p. 313, bonds.....	286
112. Vol. 12, p. 378, Assistant Surgeon-General	84
113. Vol. 12, p. 392, homesteads	370
114. Vol. 12, p. 411, contracts.....	104
115. Vol. 12, p. 422, colonization.....	332
116. Vol. 12, p. 422, direct tax.....	334
117. Vol. 12, p. 425, as to effect of direct-tax act.....	XIII
118. Vol. 12, p. 425, direct tax	331, 339
119. Vol. 12, p. 473, income tax	274
120. Vol. 12, p. 596, assignment of contracts.....	104
121. Vol. 12, p. 596, contracts, rights in.....	15
122. Vol. 12, p. 610, attorney, oath	22
123. Vol. 12, p. 772, land grants	371
124. Vol. 12, pp. 1267, 1268, emancipation	342
125. Vol. 13, p. 24, internal-revenue agents	251
126. Vol. 13, p. 26, additional Assistant Secretaries.....	67

	Page.
<i>Statutes at Large—Continued.</i>	
127. Vol. 13, p. 196, compensation of attorney	120
128. Vol. 13, p. 239, appropriations, authority of Secretary, moieties	339
129. Vol. 13, p. 240, assessment of taxes in insurrectionary States	275
130. Vol. 13, pp. 285, 286, wills, legacies	206
131. Vol. 13, p. 310, assignments by implication	26
132. Vol. 13, p. 469, salary, agents	251
133. Vol. 13, p. 502, direct tax	339
134. Vol. 13, p. 763, President's proclamation	343
135. Vol. 13, p. 771, reconstruction	344
136. Vol. 14, p. 40, marine hospitals	38
137. Vol. 14, p. 40, proceeds of sales	45, 49
138. Vol. 14, p. 40, unexpended balances	339
139. Vol. 14, p. 44, Court of Claims, jurisdiction	22
140. Vol. 14, p. 51, publishing report of Supreme Court	300
141. Vol. 14, p. 51, reporter of Supreme Court	300
142. Vol. 14, p. 64, deposits, disbursements	65
143. Vol. 14, p. 64, duties of disbursing officers	33
144. Vol. 14, p. 111, executors, claims	211
145. Vol. 14, p. 140, taxes, legacies	206
146. Vol. 14, p. 175, school farms	339, 340
147. Vol. 14, p. 191, publishing report of Supreme Court	300
148. Vol. 14, p. 191, reporter of Supreme Court	300
149. Vol. 14, p. 289, land grants	371
150. Vol. 14, p. 336, proceeds of sales	38, 45
151. Vol. 14, p. 341, public buildings	157
152. Vol. 14, p. 428, reconstruction	344
153. Vol. 14, p. 430, tenure of office	119
154. Vol. 14, p. 433, Supreme Court	299
155. Vol. 14, p. 439, signing Treasury warrants	67
156. Vol. 14, p. 468, Supreme Court	301
157. Vol. 14, p. 471, reporter of Supreme Court	300
158. Vol. 14, p. 471, Supreme Court	301
159. Vol. 14, p. 473, frauds	244
160. Vol. 14, p. 481, general inspectors	252
161. Vol. 14, p. 571, claim of persons opposed to the rebellion	22
162. Vol. 14, p. 687, civilization fund	367
163. Vol. 14, p. 687, Indians, lands	369, 371
164. Vol. 14, p. 811, reconstruction	344
165. Vol. 15, p. 2, reconstruction	344
166. Vol. 15, p. 7, advertising	310
167. Vol. 15, p. 14, reconstruction	344
168. Vol. 15, p. 54, commissioners	269
169. Vol. 15, p. 54, conclusiveness	xxx
170. Vol. 15, p. 72, Arkansas	345
171. Vol. 15, p. 73, admission of Southern States	345
172. Vol. 15, p. 257, reconstruction	344
173. Vol. 15, p. 259, net proceeds sales	39
174. Vol. 15, p. 259, sale of ordnance stores	41
175. Vol. 15, p. 301, public buildings	157
176. Vol. 15, p. 306, public buildings	157
177. Vol. 15, p. 344, reconstruction	344
178. Vol. 16, p. 1, obligations	179
179. Vol. 16, p. 41, reconstruction	344
180. Vol. 16, p. 55, Indians, lands	372

Statutes at Large—Continued.

181. Vol. 16, p. 59, reconstruction.....	344
182. Vol. 16, p. 63, Virginia.....	345
183. Vol. 16, p. 67, Mississippi	345
184. Vol. 16, p. 80, Texas	345
185. Vol. 16, p. 96, reconstruction.....	345
186. Vol. 16, p. 256, legacy tax	209
187. Vol. 16, p. 256, taxes, legacies, contracts	207
188. Vol. 16, p. 261, legacy tax.....	209
189. Vol. 16, p. 261, taxes, contracts	207
190. Vol. 16, p. 272, bonds	176, 179
191. Vol. 16, p. 272, loans	203
192. Vol. 16, p. 272, public debt, bonds	200
193. Vol. 16, p. 320, homesteads.....	370
194. Vol. 16, p. 362, Indians, lands.....	372
195. Vol. 16, p. 399, loans.....	203
196. Vol. 16, p. 438, pay of supervisors	153
197. Vol. 16, p. 494, regulations accounting officers	135
198. Vol. 16, p. 524, claims	342
199. Vol. 16, p. 566, Indian treaties.....	370
200. Vol. 16, pp. 1125, 1129, reconstruction	344
201. Vol. 17, p. 68, contracts, moieties	206
202. Vol. 17, p. 69, contracts	205, 208, 212
203. Vol. 17, p. 69, contracts, construction	205
204. Vol. 17, p. 69, contracts, moieties	206
205. Vol. 17, p. 83, proceeds of sales	38, 45
206. Vol. 17, p. 83, sales, revenue cutters.....	38
207. Vol. 17, p. 90, sale of lands.....	371
208. Vol. 17, p. 97, claims	342
209. Vol. 17, p. 203, celebrations.....	144
210. Vol. 17, p. 230, internal revenue	253
211. Vol. 17, p. 256, moieties.....	205, 212
212. Vol. 17, p. 257, executors, claims.....	211
213. Vol. 17, p. 313, advertising.....	311
214. Vol. 17, p. 333, homesteads	371
215. Vol. 17, p. 337, expenses sales military stores	45
216. Vol. 17, p. 337, proceeds of sales	45
217. Vol. 17, p. 337, sales war material.....	39
218. Vol. 17, p. 337, supplies to surveying expeditions.....	38
219. Vol. 17, p. 401, executors, claims.....	211
220. Vol. 17, p. 461, civilization fund	371
221. Vol. 17, p. 577, claims	342
222. Vol. 17, p. 783, proceeds of sale of old material	38
223. Vol. 17, p. 863, treaties, administration	237
224. Vol. 18, p. 4, member dying, &c	324
225. Vol. 18, p. 4, pay of member dying, &c	329
226. Vol. 18, p. 4, salary of Representative.....	329
227. Vol. 18, p. 50, as to practice at common law.....	xxii
228. Vol. 18, p. 53, celebrations.....	144
229. Vol. 18, p. 72, settlements, balances.....	213
230. Vol. 18, p. 76, celebrations.....	144
231. Vol. 18, p. 90, Bureau of Accounts	351
232. Vol. 18, p. 90, chiefs of Bureaus.....	349
233. Vol. 18, p. 110, appropriations	49
234. Vol. 18, p. 110, disposition of proceeds of sale.....	49

	Page.
<i>Statutes at Large—Continued.</i>	
235. Vol. 18, p. 110, permanent specific appropriations.....	220
236. Vol. 18, p. 110, proceeds of sale	36
237. Vol. 18, p. 110, sales, appropriations	55
238. Vol. 18, p. 110, settlement, balances.....	213
239. Vol. 18, pp. 113, 114, providing for publication of Revised Statutes.....	v
240. Vol. 18, pp. 113, 114, quoted.....	v
241. Vol. 18, p. 144, appropriations, rents	99
242. Vol. 18, p. 176, Indian treaties.....	370
243. Vol. 18, p. 200, disposition of proceeds of sale	37
244. Vol. 18, p. 200, marine hospitals, ordnance	55
245. Vol. 18, p. 200, net proceeds of sales.....	39
246. Vol. 18, p. 200, sales, munitions of war.....	38
247. Vol. 18, p. 200, sales of unserviceable material.....	45
248. Vol. 18, p. 200, sales, ordnance.....	56
249. Vol. 18, p. 204, claims, checks, indorsements	33
250. Vol. 18, p. 204, disbursements, charities	65
251. Vol. 18, p. 216, advances, drafts	19
252. Vol. 18, p. 216, deposits, securities	63
253. Vol. 18, p. 216, drafts, checks.....	35
254. Vol. 18, p. 253, duties United States attorney.....	120
255. Vol. 18, p. 253, judicial officers in Utah.....	150
256. Vol. 18, p. 253, section 3 quoted from	150
257. Vol. 18, p. 283, sale of lands	371
258. Vol. 18, p. 296, mutilated notes, coin	168
259. Vol. 18, p. 310, refund tax	131
260. Vol. 18, p. 310, special taxes	129
261. Vol. 18, p. 318, accounts	114
262. Vol. 18, p. 318, accounts, certificates	155
263. Vol. 18, p. 333, accounts	114
264. Vol. 18, p. 333, accounts for services performed.....	112
265. Vol. 18, p. 334, marshals' fees, limitation	165
266. Vol. 18, p. 342, advertising.....	311
267. Vol. 18, p. 349, chief of Bureau of Accounts.....	351
268. Vol. 18, p. 349, disbursing clerk.....	349
269. Vol. 18, p. 358, expenses Territorial courts.....	120
270. Vol. 18, p. 371, appropriations.....	61
271. Vol. 18, p. 371, Deputy Comptroller	70
272. Vol. 18, p. 371, Treasury Department	255
273. Vol. 18, p. 375, celebrations.....	144
274. Vol. 18, p. 388, expenses of sales.....	37, 56
275. Vol. 18, p. 388, sale of public property.....	46
276. Vol. 18, p. 389, pay-roll of Representative.....	323
277. Vol. 18, p. 389, salaries.....	326
278. Vol. 18, p. 389, salary of Representative.....	329
279. Vol. 18, p. 396, appropriations.....	61
280. Vol. 18, p. 396, Deputy First Comptroller.....	70, 249
281. Vol. 18, p. 398, Deputy First Comptroller.....	249
282. Vol. 18, p. 398, Treasury Department	255
283. Vol. 18, p. 410, material or supplies sold.....	38
284. Vol. 18, p. 410, proceeds of sales	45
285. Vol. 18, p. 415, compensations on disbursements.....	157
286. Vol. 18, p. 418, settlement, balances	213
287. Vol. 18, p. 481, claims, balances.....	213
288. Vol. 18 p. 481, counter-claim.....	xxxvi

Statutes at Large—Continued.

289. Vol. 18, p. 481, final judgment, claim.....	22
290. Vol. 18, p. 481, jurisdiction of courts.....	208
291. Vol. 18, p. 481, quoted from.....	22
292. Vol. 18, p. 481, salary, set off.....	325
293. Vol. 18, p. 481, set off.....	205, 206, 207
294. Vol. 18, p. 481, withholding salary.....	xxix
295. Vol. 18, p. 519, land grants.....	370
296. Vol. 19, pp. 3, 34, celebrations.....	144
297. Vol. 19, p. 45, celebrations.....	144
298. Vol. 19, p. 58, Indian treaties.....	370
299. Vol. 19, p. 78, advertising.....	311
300. Vol. 19, p. 127, Indians, lands.....	366, 371
301. Vol. 19, p. 127, sale of lands.....	371
302. Vol. 19, p. 152, internal revenue.....	253
303. Vol. 19, p. 169, misconduct in office.....	359
304. Vol. 19, p. 213, celebrations.....	144
305. Vol. 19, p. 214, celebrations.....	144
306. Vol. 19, p. 222, salaries.....	281
307. Vol. 19, p. 249, checks, pensioners.....	187
308. Vol. 19, p. 249, checks, securities.....	63
309. Vol. 19, p. 249, claimant, voucher, check.....	33
310. Vol. 19, p. 249, contracts.....	104
311. Vol. 19, p. 249, disbursements, charities.....	65
312. Vol. 19, p. 249, drafts and advances.....	19
313. Vol. 19, p. 249, hospital-service accounts.....	53
314. Vol. 19, p. 249, issuing check by claimant.....	32
315. Vol. 19, p. 249, materials or supplies, sale of.....	38
316. Vol. 19, p. 249, sale of material.....	58
317. Vol. 19, p. 251, fees.....	56
318. Vol. 19, p. 370, celebrations.....	144
319. Vol. 19, p. 371, pay, monthly.....	363
320. Vol. 20, p. 25, silver certificates.....	201
321. Vol. 20, p. 39, lottery tickets.....	260
322. Vol. 20, p. 39, quoted.....	260
323. Vol. 20, p. 41, quoted from.....	280
324. Vol. 20, p. 41, salary.....	280
325. Vol. 20, p. 61, authority of Sixth Auditor.....	3
326. Vol. 20, p. 61, consent of Postmaster-General for subcontracts.....	7
327. Vol. 20, p. 61, mail contractor's accounts.....	5
328. Vol. 20, p. 61, subcontractors.....	125
329. Vol. 20, p. 61, subcontracts for carrying mails.....	2
330. Vol. 20, p. 62, advertising.....	311
331. Vol. 20, p. 62, assignment of contracts.....	104
332. Vol. 20, p. 62, balance to original contractor.....	6
333. Vol. 20, p. 62, transfer of mail contract.....	15
334. Vol. 20, p. 66, Indians, interpreters, inspectors.....	158
335. Vol. 20, p. 102, District of Columbia.....	308
336. Vol. 20, p. 103, government District of Columbia.....	198
337. Vol. 20, p. 104, District of Columbia.....	306
338. Vol. 20, p. 105, District of Columbia.....	261
339. Vol. 20, p. 105, quoted.....	261
340. Vol. 20, p. 107, compensation.....	306
341. Vol. 20, p. 107, District of Columbia.....	306
342. Vol. 20, p. 130, as to auditors.....	xxvi

	Page
<i>Statutes at Large—Continued.</i>	
343. Vol. 20, p. 130, claim reported to Speaker	213
344. Vol. 20, p. 130, claims	137
345. Vol. 20, p. 130, claims, Speaker of House	207
346. Vol. 20, p. 130, disallowances	147
347. Vol. 20, p. 130, exhausted balances	22
348. Vol. 20, p. 130, rehearing on rejected claims	xxviii
349. Vol. 20, p. 140, Post-Office Department	158
350. Vol. 20, p. 141, advertising	311
351. Vol. 20, p. 178, salaries	280, 281
352. Vol. 20, p. 187, Commissioner Internal Revenue	158, 244
353. Vol. 20, p. 190, assistant treasurers, mints	158
354. Vol. 20, p. 216, advertising	311
355. Vol. 20, p. 297, appropriations, Indians	158
356. Vol. 20, p. 329, agents	253
357. Vol. 20, p. 329, internal revenue	158
358. Vol. 20, p. 333, refund tax	131
359. Vol. 20, p. 333, special taxes	129
360. Vol. 20, p. 340, claims	317
361. Vol. 20, p. 340, refund of taxes	315
362. Vol. 20, p. 349, refund tax	129, 130, 135
363. Vol. 20, p. 356, appropriations, Post-Office Department	158
364. Vol. 20, p. 358, deductions in contracts	9
365. Vol. 20, p. 410, appropriations, taxes	261
366. Vol. 20, p. 410, quoted from	261
367. Vol. 20, p. 479, experts and special agents	158
368. Vol. 20, p. 484, board of health	223
369. Vol. 20, p. 484, National Board of Health	221, 225, 227
370. Vol. 20, p. 484, public health	226
371. Vol. 20, p. 485, board of health	224
372. Vol. 20, p. 485, National Board of Health	221
373. Vol. 21, p. 5, board of health	223, 225, 227, 229
374. Vol. 21, p. 5, health, merchant vessels	226
375. Vol. 21, p. 7, board of health	224, 225
376. Vol. 21, p. 7, National Board of Health	221
377. Vol. 21, p. 11, advertising	311
378. Vol. 21, p. 26, pay, monthly	363
379. Vol. 21, p. 34, Army Regulations	46
380. Vol. 21, p. 34, sale of old material	39
381. Vol. 21, p. 46, board of health	223
382. Vol. 21, p. 50, board of health	223
383. Vol. 21, p. 50, public health	221
384. Vol. 21, p. 143, Indians, lands	371
385. Vol. 21, p. 144, Indians, lands	366, 367
386. Vol. 21, p. 144, sales of land	365
387. Vol. 21, p. 163, inviting French guests	142
388. Vol. 21, p. 163, monument at Yorktown	141
389. Vol. 21, p. 163, quoted from	142
390. Vol. 21, p. 163, Yorktown centennial anniversary	143
391. Vol. 21, p. 170, advertising	311
392. Vol. 21, p. 214, pay, vouchers	363
393. Vol. 21, p. 259, advances disbursements	156
394. Vol. 21, p. 259, public buildings	157
395. Vol. 21, p. 266, board of health	221, 224
396. Vol. 21, p. 266, epidemics	227

	Page.
<i>Statutes at Large—Continued.</i>	
397. Vol. 21, p. 236, redemption Board of Audit certificates	408
398. Vol. 21, p. 287, assignments	13
399. Vol. 21, p. 287, refund excess purchase money	15
400. Vol. 21, p. 287, special assignments	27
401. Vol. 21, p. 291, Indians, lands	366, 369, 371
402. Vol. 21, p. 296, administration, treaties	237
403. Vol. 21, p. 317, advertising	37, 54, 56, 311
404. Vol. 21, p. 339, salary consular officers	271
405. Vol. 21, p. 374, advertising	311
406. Vol. 21, p. 385, appropriations	214
407. Vol. 21, p. 385, disbursing claims	302
408. Vol. 21, p. 395, detecting	245, 249
409. Vol. 21, p. 395, expenses	249
410. Vol. 21, p. 395, expenses, agents	243
411. Vol. 21, p. 435, public debt, bonds	200
412. Vol. 21, p. 441, counterfeiting, &c	218
413. Vol. 21, p. 442, board of health	221, 224
414. Vol. 21, p. 442, epidemics	227
415. Vol. 21, p. 454, expenses of courts	152
416. Vol. 21, p. 455, Government Printing Office	94
417. Vol. 21, p. 458, salaries	306
418. Vol. 21, pp. 458, 464, quoted from	306
419. Vol. 21, p. 463, detection of crime	262
420. Vol. 21, p. 464, appropriations for officers	307
421. Vol. 21, p. 464, salaries	306
422. Vol. 21, p. 466, appropriations, taxes	261
423. Vol. 21, p. 509, Indians, lands	366, 371
424. Vol. 21, p. 520, report of Commissioner of Agriculture	93
425. Vol. 21, p. 522, Yorktown centennial anniversary	142
426. Vol. 21, p. 673, administration, treaties	237
427. Vol. 22, p. 219, appropriations	214
428. Vol. 22, p. 219, employés in House	362
429. Vol. 22, pp. 219, 254, quoted from	297
430. Vol. 22, p. 219, reporter Supreme Court	297
431. Vol. 22, p. 221, digest of the rules	362, 363
432. Vol. 22, p. 254, reporter Supreme Court	296, 297, 298
433. Vol. 22, p. 255, clerk hire, &c	218
434. Vol. 22, p. 255, employment of clerks	247
435. Vol. 22, p. 255, substitutes	347
436. Vol. 22, p. 255, quoted	247
437. Vol. 22, p. 255, special agents	63
438. Vol. 22, p. 256, appropriations	214
439. Vol. 22, p. 257, balance of salary	280
440. Vol. 22, p. 257, deficiencies, claims	265, 281
441. Vol. 22, p. 257, 261, 281, 282, and 283, quoted from	265
442. Vol. 22, p. 257, 270, quoted from	281
443. Vol. 22, p. 261, deficiencies, claims	265
444. Vol. 22, p. 265, Indian lands	365
445. Vol. 22, p. 266, Indians, lands	365
446. Vol. 22, p. 267, direct tax	339
447. Vol. 22, p. 267, expenses, sale of lands	365
448. Vol. 22, p. 267, sale of lands	366
449. Vol. 22, p. 270, deficiency	281
450. Vol. 22, pp. 281, 282, 283, deficiencies, claims	265

	Page.
<i>Statutes at Large—Continued.</i>	
451. Vol. 22, p. 284, appropriation, President Garfield	372
452. Vol. 22, p. 315, as to appropriations for National Board of Health	xii, xv
453. Vol. 22, p. 315, National Board of Health	221, 396
454. Vol. 22, p. 315, president board of health	225
455. Vol. 22, p. 331, Freedmen's Hospital	397
456. Vol. 22, p. 338, Extra pay	362
457. Vol. 22, p. 338, Pay of officers and employes of House	364
458. Vol. 22, pp. 338, 339, contested election cases	324
459. Vol. 22, pp. 339, 340, salary of Representative	329
460. Vol. 22, p. 384, land claims, transfer	371
461. Vol. 22, pp. 384, 389, 390, 392, appropriations	215
462. Vol. 22, p. 391, requiring Public Printer to publish decisions of First Comptroller	v
463. Vol. 22, p. 453, appropriations for postal service	xxi
464. Vol. 22, p. 485, reference to Court of Claims	xxxv
465. Vol. 22, p. 602, adjusting salaries of postmasters	xxi
<i>Statutes at Large (Private laws)—</i>	
1. Vol. 22, p. 9, lithocautic illustrations	111
2. Vol. 22, p. 77, repayment taxes	274
3. Vol. 22, p. 81, quoted from	316
4. Vol. 22, p. 81, refund of tax	316
5. Vol. 22, p. 81, relief of G. W. Thompson	315
6. Vol. 22, p. 100, relief of Sarah J. S. Garnett	271
<i>Statute of Limitations—</i>	
1. The right of State to enact a	168
<i>Statute of Maryland—</i>	
1. As to assests not already administered, quoted from	195
<i>Statutory Provisions—</i>	
1. As to officers	347
<i>Statutory Power—</i>	
1. Exercise of, in examining, allowing, and paying claims	xxxix
<i>Stolen Bill—</i>	
1. Onus is on purchaser to show good faith	290
<i>Stall v. Pepper—</i>	
1. Principle involved in decision of	395
<i>Storekeepers—</i>	
1. Appointment of	252
2. As to	252
<i>Story—</i>	
1. Quoted as to letters of administration	183
<i>Strict Construction—</i>	
1. As to statute making permanent specific appropriations	339
<i>Style and Title—</i>	
1. Of acts making appropriations	335
<i>Subcontract—</i>	
1. As to stipulated penalty in	1
2. Between Dorsey and Taylor for carrying mails, quoted from	2
3. For carrying mails, clause in	1
<i>Subcontractor—</i>	
1. For carrying mails, notice given by	1
2. No part of moneys earned by, shall be withheld from	7
3. Payments made to same as to original contractors	8
4. Right to compensation for service performed	8
5. Withholding penalty from	1

	Page.
<i>Subcontractors—</i>	
1. For carrying mails	125
2. For carrying mails, privileges of.....	5
<i>Subcontracts—</i>	
1. For carrying mails, authority of Postmaster-General as to	1
<i>Subject—</i>	
1. As to meaning of words	355
2. Intrusted to the exclusive jurisdiction or decision of either Department is generally conclusive on the others.....	181
<i>Subjects and Cases—</i>	
1. In their respective order, table of	xi
<i>Subjects—</i>	
1. Of decisions, based upon usages	xv
<i>Substitute—</i>	
1. Appointment of clerk	345
2. As to repeal.....	263
3. Cannot lawfully be appointed	346
<i>Substitute Case.....</i>	345
<i>Substituted Attorney—</i>	
1. Rights of	313
<i>Substituted Attorney's Case.....</i>	313
<i>Substituted Attorneys—</i>	
1. Letter of Third Auditor, as to	314
<i>Substitutes—</i>	
1. Prohibited by act of August 5, 1882.....	347
<i>Substitution—</i>	
1. Power of attorney with power of	231
<i>Sub-treasuries—</i>	
1. As to credits of disbursing officers	297
2. Circular to, as to indorsements	192
<i>Sub-treasury—</i>	
1. Why established	239
<i>Succession in Office—</i>	
1. As to commencement of salaries (see Opinions Attorney-General, Vol. 4, p. 123).....	215
<i>Succession—</i>	
1. Title to negotiable instrument may pass in	292
<i>Successive Holders—</i>	
1. As to blank assignment.....	293
<i>Successive Indorsements—</i>	
1. As to registered bond	292
<i>Successor—</i>	
1. As to disposition of bonds	190
2. To member of Congress, who is a	322
<i>Successors—</i>	
1. In the trust, as to appointment of.....	xxxiv
2. In trusts, rights of	195
<i>Suit—</i>	
1. As to denial by claimant of indebtedness.....	xxix
2. As to, on bond of executive officer	xxxix
<i>Suits—</i>	
1. Against individuals brought by the United States.....	xxix
2. For rights to testator's personal property.....	236
<i>Summoning Jurors—</i>	
1. Method of.....	165

	Page.
<i>Sundry Civil Appropriation Act—</i>	
1. Of March 3, 1881, quoted as to counterfeiting.....	213
2. As to extra pay for preparing digest	364
<i>Superintendent—</i>	
1. Of Government Hospital for the Insane, letter of	57
2. Of public schools in District of Columbia.....	305
<i>Superintendents—</i>	
1. As to.....	306
<i>Supervisors of Election—</i>	
1. As to decision of.....	xxv
<i>Supervisory Jurisdiction—</i>	
1. Over accounts and claims, by First Comptroller.....	xx
<i>Supplies Furnished—</i>	
1. As to illness and burial of late President Garfield	374
2. Schedule "A," as to illness and burial of late President Garfield.....	380
<i>Supplies—</i>	
1. Purchase of, for Government hospital.....	57
2. To officers and soldiers, sales of.....	55
3. Under void contract.....	93
<i>Supreme Court—</i>	
1. As to direct-tax act	339
2. As to legality of contracts	85
3. As to letters testamentary	236
4. As to power to revoke orders and decrees	xxxii
5. As to practice of Executive Departments.....	181
6. As to rights of parties in Gibson's case	294
7. Construction of section 3477, Revised Statutes, by	16
8. Decrees of, canceling patents to Kansas lands	371
9. Decision of, regarding patents.....	77
10. Decisions of, as to individual rights.....	xlii
11. Of District of Columbia, as to administration.....	234
12. Opinion of, as to conclusiveness of allowances by Commissioner of Internal Revenue.....	134
13. Opinion of, regarding drafts of Army contractors.....	127
14. Opinion of, regarding drafts of mail contractors.....	128
15. Place of holding.....	150
16. Regarding claims	20
17. Shows that unliquidated claims cannot be assigned	16
18. Territorial, annual terms of	151, 152
19. Territorial, time when, and place where held, fixed by the local legislature	148
20. Quoted as to claims	17
<i>Supervisors—(See Agents, Commissioners, Inspectors.)</i>	
1. Of elections, accounts of.....	153
2. Of internal revenue, as to.....	252
<i>Sureties—</i>	
1. As to immunity of, from past or prospective liability	12
2. Of a contractor for carrying mails, as to liability for damages of	1
3. Of a contractor for carrying mails, rights of.....	4
4. Of John W. Dorsey.....	1
5. On a bond.....	75
6. Right of mail contractor to demand forfeiture denied	11
<i>Surety—</i>	
1. Released if loss has been caused by the fault of the creditor.....	12
2. When discharged.....	12

	Page.
<i>Suretyship</i> —	
1. As to indorsement of pension checks.....	188
<i>Surplus</i> —	
1. Of proceeds of sale, disposition of.....	339
<i>Surplusage</i> —	
1. As to construction of statutes.....	320
2. As to contracts for carrying mails.....	4
<i>Surplus Fund</i> —	
1. Balances of appropriations carried to.....	22
2. Proceeds of sale of old material carried to.....	55
<i>Surplus Lands</i> —	
1. Of Great and Little Osage Indians, purchase of.....	371
<i>Surgeon-General</i> —	
1. Of Marine Hospital Service.....	226
<i>Survey of Land</i> —	
1. As to cost of.....	367
<i>Surveying Expeditions</i> —	
1. Sale of supplies to.....	38
<i>Surveyor-General</i> —	
1. Districts assigned to.....	158
<i>Surveyors of Customs</i> —	
1. Districts assigned to.....	158
<i>Survivorship</i> —	
1. As to indorsements.....	191
<i>Sweden</i> —	
1. Effect of laws of, over married persons in the United States.....	175
2. Laws of, regarding marriage.....	175
3. Laws of, regarding rights of husbands.....	170
<i>System</i> —	
1. Of law, development and elucidation of.....	xxiii
2. Of laws and regulations regarding Government bonds.....	201
T.	
<i>Table of Cases</i>	vii
<i>Table of Cases and Subjects</i> —	
1. In their respective order.....	xi
<i>Table of Claimants</i>	ix
<i>Tally Clerk</i> —	
1. Of House, as to.....	362
<i>Tangibilities</i> —	
1. Difference between a right of action and.....	168
<i>Tangible Chattel Property</i> —	
1. As to.....	234
<i>Tangible Chattels</i>	
1. Title of finder of.....	168
<i>Tax</i> —(See <i>Income Tax</i> .)	
1. As to.....	339
2. On legacies repealed.....	206
3. On spirits, as to.....	315
<i>Taxable Business</i> —	
1. Examination into.....	251
<i>Taxes</i> —	
1. As to in the District of Columbia.....	263
2. As to.....	131
3. As to material used in distillation.....	395

	Page.
<i>Taxes—Continued.</i>	
4. As to refund of.....	XXXIII
5. Collection of.....	242
6. Liability of Government to refund.....	XIX
7. On lands.....	334
8. On legacies left by General Wool.....	206
9. Unauthorized collection of.....	277
<i>Tax Sales—</i>	
1. As to proceeds of.....	339
<i>Taylor, R. W.—</i>	
1. Opinion of, as First Comptroller regarding sale of old material.....	47
<i>Tayloe's Case</i>	190
<i>Tayloe, Benjamin Ogle—</i>	
1. Party in Tayloe's case	192
<i>Tayloe, Edward Thornton—</i>	
1. Party in Tayloe's case.....	191
<i>Tayloe, John—</i>	
1. Party in Tayloe's case	192
<i>Tayloe, Virginia—</i>	
1. Party in Tayloe's case	192
<i>Tayloe, William H.—</i>	
1. Party in Tayloe's case	191
<i>Taylor, Eugene—</i>	
1. Party in Dorsey's appeal case	2
<i>Teachers—</i>	
1. As to.....	306
<i>Temporary appointment—(See Assignment.)</i>	
<i>Tennessee—</i>	
1. Act for relief of citizens of.....	275
2. President's proclamation as to	343
3. Rights of administrator under laws of.....	241
<i>Term—</i>	
1. Of courts, as to.....	XXXII
2. Of office, statutory limitation of.....	115
<i>Terms—</i>	
1. Of court in Montana, number of, in each year.....	150
2. Of court in Utah Territory specified	150
3. Of holding court, control of legislature over.....	149
<i>Terms and Phrases—</i>	
1. In a statute	309
<i>Territorial Assembly—</i>	
1. Legislative powers of	152
<i>Territorial Case</i>	148
<i>Territorial Courts—</i>	
1. As courts.....	153
2. Expenses of	152
3. Trial of causes in, arising under Constitution.....	153
4. Trials of Government cases in.....	153
<i>Territorial Governments—</i>	
1. As to.....	360
<i>Territorial Legislature—</i>	
1. Invested with general authority.....	148
2. Power of	148
<i>Territorial Supreme Court—</i>	
1. Time when and place where, held fixed by legislature	148

	Page.
<i>Territories—</i>	
1. Terms of officers of	115
<i>Testamentary Trust—</i>	
1. As to disposition of United States bonds	196
<i>Testator—(See Administrator, Executor, Foreign Guardian.)</i>	
1. As to registered bonds	190
<i>Testators—</i>	
1. As to assets or trusts	191
<i>Third Auditor—</i>	
1. Letter of, as to disbarred attorneys	314
2. States accounts of pension agents	185
<i>Third Party—</i>	
1. Assigning contracts to	18
2. Government not bound to accept service of	18
<i>Thompson, G. W.—</i>	
1. Party in Atherton and Co.'s case	315
<i>Thompson, Joseph Addison—</i>	
1. Authorized to perform duties of Deputy First Comptroller	285
<i>Time—</i>	
1. As to change of policy	343
2. Controlling element as to exigency	93
3. Of payment of salary	19
4. Schedule, as to carrying mails	2
<i>Title—</i>	
1. Cannot control plain, intent of statute	24
2. Considered in construing act	331
3. Of act used to interpret meaning of	24
4. Of administrator, when vested	272
5. Of an administrator	235
6. Sanborn derived, to money received from United States	211
7. To money collected by Government under color of law	206
8. To office when effected	117
9. To Osage ceded land, how settled	371
<i>Tobacco—</i>	
1. Inspection of	252
<i>Tonics—</i>	
1. As to	130
<i>Township Officers—</i>	
1. As to summoning jurors	165
2. Jurors summoned by	163
<i>Transfer—</i>	
1. As to negotiable instruments	292
2. Of bonds	194
3. Of bonds, claim for	190
4. Of Government bonds	170
5. Of registered bonds	286
6. Of securities by wife	170
<i>Transfer of Title—</i>	
1. Copy of directions as to, printed on the backs of the bonds	203
<i>Transfers—</i>	
1. And assignments of claims	13
2. As to claims	348
3. Or assignments of mail contracts	6

	Page.
Transportation—	
1. Of mails.....	1
Traveling Expenses—	
1. As to.....	258
2. In lieu of mileage	163
3. Of Representatives, accounts for	328
Treasurer—	
1. Action of, as to indorsements.....	191
2. Assistant of, may act as deputy.....	72
3. As to bonds and interest checks.....	179
4. As to payment of bonds, without Treasury warrant	200
5. As to payment of claims	302
6. As to payment of Government bonds	XXVII
7. As to payment of interest coupons.....	XXVII
8. Duties of, regarding warrants.....	67
9. Payment of warrant made by.....	16
Treasury—	
1. As to power of court to command withdrawal of money from.....	XL
2. Clerks appointed in	247
3. Establishment of.....	247
4. Fraud upon, by transfers and powers of attorney	17
5. Independence of, from control of courts.....	XL
6. Organization of	63
7. Warrants for money to be issued from.....	67
Treasury Department—	
1. Abandoned or captured property taken by agents of.....	XXXVIII
2. Accounting officers only in.....	XXIV
3. Action of accounting officers in, as to claims	XXIV
4. Act to establish the.....	67
5. Appointment of substitutes in.....	345
6. As to control of Congress over payments by	XVII
7. As to evidence of usage in	XV
8. As to knowledge and practice of officers in.....	XV
9. As to manuscript files in.....	XV
10. As to officers or tribunals authorized to act on claims	XXIV
11. As to payment of debt to foreign guardian of alien	182
12. As to publication of Decisions of First Comptroller of	V
13. As to records	XV
14. Authorizing assignment of part interest in bonds	202
15. Correspondence of, as to	XV
16. Establishment of	72
17. Marital rights of husband as to assigning bonds or indorsing interest checks	176
18. Organization of, as to accounts.....	XXX
19. Practice of, as to accounts, analogous to that in courts.....	XXX
20. Practice of, as to executors or administrators	231
21. Practice of, in matters connected with the office of the First Comptroller.....	XV
22. Processes of, are all <i>ex parte</i>	XXXII
23. Prosecution of claims in the	XXVIII
24. Questions as to disbursements from the	XVIII
25. Questions relating to practice in	IX
26. Rights of parties examined in.....	XXXIV
27. Rule in, regarding foreign guardians	171
28. Transfer of title to bond on books of	292
29. Usage of, as to indorsing interest checks	176

	Page.
<i>Treasury Draft</i> —	
1. As a commercial check	233
<i>Treasury Drafts</i> —	
1. Authority of administration to collect	231
2. Payment of	189
<i>Treasury Notes</i> —	
1. As to	290
<i>Treasury Warrant</i> —	
1. As to payment of salary	297
2. Regarding signing and countersigning of	62
3. Signing and countersigning a	68
<i>Treaties</i> —	
1. As to construction of	xxiii
2. As to elementary	xxvi
3. Executive construction of	xxiii
<i>Treaty</i> —	
1. As to Indian lands in Kansas	370
2. Between United States and foreign country as to claims	397
3. With France, January 15, 1880, as to the settlement of claims	235
4. With Great Britain as to Alabama claims	237
<i>Treaty-making Power</i> —	
1. As to	365
<i>Trescot, William Henry</i> —	
1. Attorney for State of South Carolina	332
<i>Tribes</i> —	
1. Of Great and Little Osage Indians, surplus lands of	371
<i>Trust</i> —	
1. As to disposition of registered bonds	190
2. As to, when a subject of equity jurisdiction	xl
3. Execution and delegation of a	62
4. Reposed by law in public officers cannot be delegated	67
<i>Trustee</i> —(See <i>Executor, Lunatics</i>)—	
1. Executor's claim as	190
<i>Trustees</i> —	
1. As to death of one or more of several	xxxiv
<i>Trusts</i> —	
1. Administration of	191
2. Difference between	192
<i>Twenty Thousand Dollars</i> —	
1. Appropriated for expenses of observance of the centennial anniversary of surrender of Lord Cornwallis at Yorktown	141
<i>Two Affirmative Provisions</i> —	
1. As to	149
<i>Two Offices</i> —	
1. As to pay for holding	357
<i>Two Salaries</i> —	
1. As to receiving	357
U.	
<i>Ubiquity</i> —	
1. Throughout the Union, of the United States Government	183
<i>Unexpended Balances</i> —	
1. Of appropriations	224
<i>Union</i> —	
1. There can be no common law of the	xxii
2. With slavery, saving the	337

	Page.
<i>Union Springs—</i>	
1. As to false description case.....	267
<i>United States—</i>	
1. A public political corporation.....	106
2. As to claims due to the.....	xxix
3. Difference between, and private debtor	240
4. Existence of, as a political corporation.....	239
5. May sue a debtor in any of its courts.....	xxix
6. The, can only act through its duly authorized officers or agents	106
<i>United States Bonds—(See Bonds, Coupon Bonds, Interest.)</i>	
<i>United States Courts--</i>	
1. In Territories.....	149
<i>United States Note—</i>	
1. Title of finder of.....	166
2. Redemption of.....	167
<i>Unofficial Employes—</i>	
1. As to.....	345
2. In the District Government	306
<i>Unsigned National Bank Notes—</i>	
1. Not redeemable by Treasurer	168
<i>Unwritten Law—</i>	
1. As to a system of.....	xxiii
<i>Usage—(See Practice; Regulations.)</i>	
1. And contemporaneous construction as to	355
2. As to asking the opinion of First Comptroller in advance.....	xxi
3. As to assignments of Army contractors	127
4. As to clerks in Internal Revenue Bureau	255
5. As to contracts before and after marriage.....	175
6. As to proceeds of sales old material.....	41
7. As to salaries.....	22
8. As to set-offs.....	xxix
9. As to the public health	224, 230
10. Cannot alter law.....	xxiv
11. Cannot change statute.....	122
12. Force of	xxiv
13. Of banks in paying checks.....	155
14. Of construction given to law.....	xxiv
15. Of Treasury Department as to assignment of bonds	176
16. Of Treasury Department as to investigations	248
17. In Treasury Department, evidence of, where found	xv
18. Of Treasury Department, long continued, becomes law.....	176
<i>Usages—</i>	
1. As to growth of.....	xxiii
2. As to knowledge and practice of officers in Treasury Department	xv
3. As to national and international law.....	xxiii
<i>Usages of Congress—</i>	
1. As to construction of statutes	296
<i>Utah—</i>	
1. Appropriations for courts in	153
2. Supreme and district courts of	129
<i>Utah District Attorney's Case.....</i>	110
<i>Utah Territory—</i>	
1. Terms of court in, specified	150

V.

Page.

Vacancies—

1. As to..... 345
2. Power always exists to fill 115

Vacancy—

1. As to election to fill a..... 323
2. Happening during recess of Senate.. 284
3. flice of Representatives 321
4. In seat of member of Congress, what is a..... 322
5. May be temporarily filled for ten days..... 284
6. Salary of one elected and appointed to fill..... 322

Vacation—

1. Of office, what is a..... 346

Valuable Consideration—

1. As to gifts from husband to wife 178

Venire—

1. Fee for serving..... 164

Vernon Springs—

1. As to false description case..... 267

Vessels—

1. Regulations for, as to health..... 226

Vested Right— (See Rights.)

2. As to courts and land claims xli

Vested Rights—

1. Constitutional limitation of power of Congress over.... 272

Views of the minority—

1. As to expenses incident to illness and burial of late President Garfield.. 394

Virginia—

1. Lawrence's speech as to reconstruction of 343

Void Clause—

1. In subcontract for carrying mails..... 11

Void Contract—

1. As to, for carrying mails..... 11

Void Contracts—

1. Give no rights to parties serving under them 209

Volumes of Decisions—

1. As to reporter of Supreme Court 298

Voluntary Assignment—

1. As to rights of assignee..... 395

Voluntary Conveyances—

1. As to..... 235

Voluntary Gift—

1. Husband may exercise marital rights over..... 178

Voluntary Payment—

1. As to set-off by Treasury Department..... 209
2. To foreign guardians 181
3. Under mistake sometimes cannot be recovered back..... 211

Voluntary Settlement—

1. In favor of wife and force of 178

Volunteer—

1. A, who thrusts his services upon another unsolicited cannot recover compensation therefor..... 113

Voucher—

1. Disbursing officers' receipted..... 32
2. Of pensioner, as to accounts of pension agents 187

	Page
<i>Vouchers—</i>	
1. Approved by auditor of the District.....	263
2. Approved by the Secretary of State for expenses of "German guests" ..	141
3. As to.....	xxix
4. As to duplicate original	349
5. As to illness and burial of late President Garfield	374
6. As to relief for loss of	xxxviii
7. Executed by pensioners.....	185
8. For expenses of "German guests," as to	143
9. For payment, as to substitutes.....	346
10. Of disbursing officers	14
11. Of reporter of Supreme Court, as to salary	297
12. Pay-rolls as	29
13. When not allowed.....	148
W.	
<i>Waiver—</i>	
1. Estoppel of husband from denying validity of	170
2. Of rights by wife.....	170
3. Of the canon of public policy regarding assignments of contracts	18
4. Rights of Government in respect to taxes.....	275
5. Rights of husband as to	170
6. Validity of post-nuptial contract.....	170
<i>Walsh's Case</i>	122
<i>Walsh, J. A.—</i>	
1. Letter of, to Sixth Auditor.....	126
2. Party in Walsh's case.....	124
3. Pay drafts filed by.....	124
<i>Walz, Alphonse—</i>	
1. Party in Malakof Bitters case.....	129
<i>War—</i>	
1. As to direct taxes.....	343
<i>War Department—</i>	
1. Establishment of	72
<i>Warehouses—</i>	
1. Inspection of distillery	252
<i>Warrant—</i>	
1. And draft, examination of, not compulsory upon Secretary of the Treas- ury	82
2. And draft issued thereon.....	231
3. As to power of attorney after issuing of.....	24
4. Carrying amounts to credit of appropriations	217
5. Effect of date of, over powers of attorney	14, 25
6. Effect of issuing, over powers of attorney.....	13
7. For payment countersigned by First Comptroller	xxxii
8. For payment granted by Secretary of the Treasury	xxxii
9. For payment may be recalled for correction of certificate of balance	xxxii
10. For payment of claims.....	13
11. For payment of claims countersigned by First Comptroller.....	16
12. Influence of issuance of	36
13. Issued for payment of claims by Secretary of Treasury.....	16
14. Issuing of, as to claims	36
15. Not lawful until signed by the Secretary.....	82
16. Of arrest.....	269
17. On the Treasury as to direct taxes.....	340

	Page.
Warrant—Continued.	
18. Payment of, by draft.....	25
19. Payment of, by Treasurer in money	24
20. Payment of, made by Treasury.....	16
21. Treasury, as an important public document.....	83
Warrants—	
1. As to counter-signature of.....	285
2. As to expenses of illness and burial of late President Garfield	377
3. As to payment of claims.....	297
4. As to the validity of Treasury	xx
5. Circular of Attorney-General, as to	92
6. Drawn by the Secretary of Treasury, countersigning of.....	77
7. Examination of	81
8. First Comptroller is the only officer who countersigns.....	xxi
9. Issue by commissioners.....	89
10. Issuing and countersigning	xxvii
11. May be paid in money.....	240
12. Must be examined by Assistant Secretaries and prepared for signature of the Secretary of the Treasury	82
13. Payment of, Post-Office Department	189
14. Regarding the delegation of power to sign or countersign.....	61
15. Signed by Assistant Secretary, validity of.....	68
16. Treasury, cannot be signed by the Assistant Secretary unless appointed by the Secretary to do so	82
War Tax—(See <i>Income Tax</i>.)	
Washington, George—	
1. Commander-in-Chief of the combined forces of America and France	141
2. Surrender of Earl Cornwallis to.....	141
Watchman—	
1. As to	247
Watchmen—	
1. Substitutes for	345
Weights and Measures—	
1. International Bureau of	354
Whisky—	
1. In bottles as a remedy for diseases	130
White, Geo. H. B.—	
1. Party in Walsh's case	124
Whittlesey, Elisha—	
1. First Comptroller, opinion by, as to permanent legislation.....	304
Whyte, William Pinkney—	
1. Attorney for Hoen & Co	95
Widow—	
1. Of Congressman, rights of.....	329
2. Right of, to gratuity	270
Wife—	
1. Capacity given to, by Congress to assign [bonds and indorse interest checks.....	176
2. Rights of	170
Will—	
1. Legatees under, as to disposition of registered bonds	191
Wills—	
1. Questions of law or construction in relation to	194
Windsor & Dixon—	
1. Parties in Dorsey's appeal case	2

	Page.
<i>Wirt, William—</i>	
1. Attorney-General, discussion by, as to meaning of signature	68
2. Quoted as to legal signature.....	69
<i>Witnesses—</i>	
1. Absence of	268
2. As to illness and burial of late President Garfield.....	376
<i>Wool, General John E.—</i>	
1. Party in Sanborn's case.....	206
<i>Words—</i>	
1. As to special subsequent.....	246
2. General, are to have general application	151
3. How meanings of, vary.....	358
4. Legal acceptance of meaning of	308
5. Ordinary meaning of	134
6. Restraining literal meaning of.....	277
7. Various interpretations of	358
<i>Writ of Error—</i>	
1. As to	xxvii
<i>Writ of Mandamus—</i>	
1. As to	xxxvi
<i>Writes—</i>	
1. Fees for serving.....	164
<i>Written Contracts—</i>	
1. As to	229
<i>Written Instrument—</i>	
1. Parole evidence to explain	267
<i>Wrong Claimant—(See Claimant.)</i>	
<i>Wrong—</i>	
1. Done to citizens, repairing a.....	274
<i>Wrong Person—</i>	
1. Payment to	24
Y.	
<i>Year's Support—</i>	
1. Of widow	272
<i>Yellow Fever—</i>	
1. Prevention of spread of.....	222
<i>Yorktown Centennial Case.....</i>	141
<i>Yorktown Celebration—</i>	
1. Effect of excluding others than our own citizens from.....	144

INDEX TO APPENDIX.

A.

	Page.
Accounts—	
1. Certificates of balances of	409
2. Division of, in the office of the Treasury of the United States, as to	404
3. Of the receipts and expenditures of public moneys	409, 414
4. Of Treasurer, copy of, transmitted to Congress.....	401
5. Of Treasurer, copy of, transmitted to Secretary	401
6. Of Treasurer settled quarterly.....	401
7. Which have been finally adjusted, disposition of.....	409
Act—	
8. Of (legislative assembly of District of Columbia) July 10, 1871, referred to.....	425
9. Of (legislative assembly of District of Columbia) July 20, 1871, referred to.....	425
10. Of (legislative assembly of District of Columbia) August 23, 1871, referred to	425, 426
11. Of (legislative assembly of District of Columbia) December 16, 1871, referred to.....	425
12. Of (legislative assembly of District of Columbia) June 19, 1872, referred to.....	425, 426
13. Of (legislative assembly of District of Columbia) June 20, 1872, referred to	425
14. Of (legislative assembly of District of Columbia) June 23 and 25, 1873, referred to.....	425
15. Of (legislative assembly of District of Columbia) June 26, 1873, referred to.....	425
16. September 2, 1789, office of Register of the Treasury.....	409
17. September 2, 1789, Treasurer's office.....	401
18. April 21, 1808, contracts.....	433
19. April 21, 1808, contracts, Congressmen.....	435
20. April 24, 1808, contract, Congressmen	439
21. March 3, 1839, extra allowance.....	435
22. April 15, 1842, coupon bonds.....	425
23. August 23, 1842, arbitrary extra allowances	438
24. August 23, 1842, extra allowance, appropriation.....	435
25. August 26, 1842, arbitrary extra allowances.....	438
26. August 26, 1842, extra service, compensation	435
27. March 3, 1843, coupon bonds.....	425
28. August 6, 1846, public moneys, draft.....	402
29. March 31, 1848, coupon bonds.....	425
30. September 9, 1850, coupon bonds.....	425
31. September 30, 1850, arbitrary extra allowances	438
32. September 30, 1850, double offices and salaries	435
33. August 31, 1852, Congressmen	438

	Page
<i>Act—Continued.</i>	
34. August 31, 1852, double compensation.....	440
35. August 31, 1852, double salaries.....	431
36. August 31, 1852, office, salary.....	435
37. June 14, 1858, coupon bonds.....	425
38. June 22, 1860, coupon bonds.....	425
39. February 8, 1861, coupon bonds.....	425
40. March 2, 1861, coupon bonds.....	425
41. July 17, 1861, coupon bonds.....	425
42. July 17, 1861, interest checks.....	426
43. August 5, 1861, coupon bonds.....	425
44. August 5, 1861, interest checks.....	426
45. February 25, 1862, coupon bonds.....	425
46. March 1, 1862, certificates of indebtedness.....	425
47. July 1, 1862, interest checks.....	426
48. July 2, 1862, oath.....	447
49. July 17, 1862, judge-advocate.....	447
50. February 20, 1863, Assistant Register of the Treasury.....	410
51. March 3, 1863, assistant treasurer.....	402
52. March 3, 1863, coupon bonds.....	425
53. March 3, 1863, gold certificates.....	406, 425
54. March 3, 1863, interest-bearing Treasury notes.....	425
55. March 3, 1863, interest checks.....	426
56. March 3, 1863, loans, coupons.....	425
57. March 3, 1863, process for witnesses.....	447
58. March 3, 1864, coupon bonds.....	425
59. June 11, 1864, Congressmen, claim agents.....	439
60. June 11, 1864, contract, claim, Congressmen.....	436
61. June 30, 1864, coupon bonds.....	425
62. July 2, 1864, interest checks.....	426
63. March 3, 1865, coupon bonds.....	425
64. March 2, 1867, certificates of indebtedness.....	425
65. July 27, 1868, loans, coupons.....	425
66. July 8, 1870, certificates of indebtedness.....	425
67. July 8, 1870, loans, coupons.....	425
68. July 14, 1870, coupon bonds.....	425
69. July 14, 1870, interest checks.....	426
70. January 20, 1871, coupon bonds.....	425
71. January 20, 1871, interest checks.....	426
72. March 17, 1872, money securities.....	429
73. May 8, 1872, loans, coupons.....	425
74. June 8, 1872, certificates of deposit.....	403
75. June 8, 1872, certificates of indebtedness.....	425
76. June 8, 1872, currency certificates.....	406
77. May 11, 1874, coupon bonds.....	425
78. June 20, 1874, coupon bonds.....	425
79. June 20, 1874, interest checks.....	426
80. June 20, 1874, redemption agency.....	407
81. June 20, 1874, redemption agent.....	401
82. February 20, 1875, interest checks.....	426
83. March 3, 1875, District accounts, deposits.....	401
84. March 3, 1875, organization Treasurer's office.....	402
85. June 10, 1876, custodian of securities for Indian tribes.....	402
86. June 11, 1878, pay of street contractors.....	408
87. March 3, 1879, arbitrary extra allowances.....	438

	Page.
<i>Act—Continued.</i>	
88. June 10, 1879, interest checks.....	426
89. June 10, 1879, loans, coupons	425
90. June 16, 1880, redemption Board of Audit certificates	408
91. March 2, 1881, names and numbers of vessels.....	428
92. March 3, 1881, redemption Board of Audit certificates	408
93. June 22, 1882, salaries, &c., Congressmen.....	402
94. Legislative assembly (D. C.), July 10, 1871, coupons, loans.....	425
95. Legislative assembly (D. C.), July 20, 1871, loans, coupons.....	425
96. Legislative assembly (D. C.), August 23, 1871, interest checks.....	426
97. Legislative assembly (D. C.), August 23, 1871, loans, coupons.....	425
98. Legislative assembly (D. C.), December 16, 1871, loans, coupons	425
99. Legislative assembly (D. C.), June 19, 1872, interest checks	426
100. Legislative assembly (D. C.), June 19, 1872, loans, coupons.....	425
101. Legislative assembly (D. C.), June 20, 1872, loans, coupons	425
102. Legislative assembly (D. C.), June 23, 1873, loans, coupons	425
103. Legislative assembly (D. C.), June 25, 1873, loans, coupons	425
104. Legislative assembly (D. C.), June 36, 1873, loans, coupons	425
<i>Agency—</i>	
1. National bank redemption, as to	407
<i>Agent—</i>	
1. Of Joint Library Committee, as to	413
<i>Agriculture—</i>	
1. Commissioner of, as to.....	413
<i>Annual Report—</i>	
1. Of Treasurer of the United States.....	401
<i>Appropriation Ledgers—</i>	
1. As to.....	418
<i>Army Officers—</i>	
1. In charge of public buildings and grounds.....	413
<i>Assistant Register of the Treasury—</i>	
1. Office of, when established.....	410
<i>Assistant Treasurer—</i>	
1. Duties of.....	402
2. Of the United States, at Washington, establishment of office of.....	402
<i>Assistant Treasurers—</i>	
1. As to.....	413
<i>Attorney-General—</i>	
1. Opinion of, vol. 4, p. 48, Congressmen jobbing.....	439
2. Opinion of, vol. 5, p. 768, arbitrary extra allowances.....	438
3. Opinion of, vol. 6, p. 80, arbitrary extra allowances	438
4. Opinion of, vol. 6, p. 325, arbitrary extra allowances.....	438
5. Opinion of, vol. 14, p. 407, offices, Congressmen.....	433
6. Opinion of, vol. 14, p. 408, agency	433

B.

<i>Balances—</i>	
1. Of accounts, certificates of.....	409
<i>Bonds—</i>	
1. Deposited to secure circulating notes of national banks.....	401
2. Issued, as to.....	409
3. Redeemed, as to.....	409
4. Transferred, as to.....	409
<i>Book-keeping—</i>	
1. Subdivision of, in the office of the Register of the Treasury	412

	Page.
<i>Bureau—</i>	
1. Of Engraving and Printing, as to	430
C.	
<i>Cashier—</i>	
1. In office of the Treasurer of the United States, duties of	403
<i>Certificates—</i>	
1. Of adjusted accounts, copies transmitted to Secretary	40
2. Of balances of accounts	409
3. Of indebtedness, as to	409
4. Of registry enrolments and licenses issued to and surrendered by ves- sels	409
5. Record of, as to	409
<i>Charitable Institutions—</i>	
1. Of District of Columbia, treasurer of, as to	414
<i>Chief Clerk—</i>	
1. Court of Claims, as to	414
2. In office of the Treasurer of the United States, duties of	402
<i>Circulating Notes—</i>	
1. Of national banks	401
<i>Civil Appropriation Ledger—</i>	
1. As to	419
<i>Civil Service Commission—</i>	
1. Disbursing agents, as to	414
<i>Clerk—</i>	
1. Of House of Representatives, as to	413
<i>Coast Survey—</i>	
1. Disbursing agent of, as to	413
<i>Commissioner—</i>	
1. Of Agriculture, as to	413
<i>Commissioners—</i>	
1. Of the District of Columbia, as to	413
2. Of the sinking fund of the District of Columbia, duties of, transferred to Treasurer	402
<i>Comptrollers—</i>	
1. Warrants (requisitions) countersigned by	401
<i>Constitutional Law—</i>	
1. The Constitution article 1, section 6, does not prohibit a person who is professionally retained under sections 363, 366 of the Revised Statutes from being a member, because such retainer is not an office. (See 14 Opinions, 409, Williams, Attorney-General, July 3, 1874)	431
<i>Construction—</i>	
1. Of Revised Statutes. The professional retainer of a member of Congress under section 366; and 366 is not a contract within the meaning of sections 3739-3742	431
<i>Copies—</i>	
1. Of papers furnished by the Register of the Treasury, as to	409
<i>Copying and Records—</i>	
1. Subdivision of, in the office of the Register of the Treasury	411
<i>Countersignature—</i>	
1. Of warrants (requisitions) by Comptrollers	401
<i>Criminal Law—</i>	
1. Sections 3739-3742 Revised Statutes are not violated by a member of Congress who is professionally retained as an attorney under section 363 of the Revised Statutes	431

	Page.
<i>Crowley's Case—</i>	
1. A person employed by the Attorney-General under sections 363, 366 of the Revised Statutes, to assist a district attorney is not an officer; such employment is a professional retainer. See opinion Attorney-General Williams, June 6, 1874. (14 Opinions Attorney-General, 406).....	431
<i>Currency—</i>	
1. Division of, in the office of the Register of the Treasury.....	428
<i>Coupon Bonds—</i>	
1. As to redeemed	409
<i>Coupons—</i>	
1. As to.....	409
2. Redeemed, as to.....	409
<i>Court-Houses—</i>	
1. As to.....	414
<i>Court of Claims—</i>	
1. Chief clerk of, as to	414
<i>Custodian—</i>	
1. For certain Indian tribes, as to	402
2. Of bonds, as to.....	409
3. Of national bank securities, Treasurer made.....	401
4. Of securities held in trust by Secretary of the Treasury.....	402
<i>Customs Appropriation Ledger—</i>	
1. As to.....	419
<i>Customs Personal Ledger—</i>	
1. As to.....	416
D.	
<i>Delegates in Congress—</i>	
1. Disbursements of salaries and mileage of.....	402
<i>Department of State—</i>	
1. Disbursing clerk, as to	412
<i>Depositories—</i>	
1. National banks designated as	401
<i>Deposits—</i>	
1. To secure circulating notes of national banks.....	401
<i>Diplomatic Personal Ledger—</i>	
1. As to.....	415
<i>Disbursement—</i>	
1. Of United States moneys	401
<i>Disbursements—</i>	
1. Upon warrants	401
<i>Disbursing Agent—</i>	
1. Executive Mansion, as to.....	414
2. Of the United States Coast Survey, as to.....	413
<i>Disbursing Agents—</i>	
1. Civil Service Commission, as to	414
2. National Board of Health, as to.....	414
3. Of Fish Commission, as to	414
4. Of United States, as to	414
5. Supreme Court, as to	414
<i>Disbursing Clerk—</i>	
1. Department of State, as to.....	412
2. Navy Department, as to.....	412
3. Post-Office Department, as to	413
4. War Department, as to	412

	Page.
<i>Disbursing Clerks—</i>	
1. Treasury Department, as to	412
<i>District Attorney—</i>	
1. A person employed by the Attorney-General, under sections 363, 366 of the Revised Statutes, to assist a, is not an officer. Such employment is a professional retainer. (See opinion Attorney-General Williams, June 6, 1874, Opinion Attorney-General, 406)	431
<i>District of Columbia—</i>	
1. As to moneys of	402
2. Charitable institutions of, as to	414
3. Commissioners of, as to	413
<i>District of Columbia Sinking Fund Office—</i>	
1. In the office of the Treasurer of the United States, as to	408
<i>Destruction Committee—</i>	
1. As to	409
<i>Dividends—</i>	
1. Of interest, declaring	409
<i>Divisions—</i>	
1. In Register's office	410
2. In the office of the Treasurer of the United States	402
<i>Duties—</i>	
1. Of Assistant Register of the Treasury	410
2. Of the office of the Register of the Treasury	409

E.

<i>Engraving and Printing—</i>	
1. Bureau of, as to	430
<i>Enrollment Books—</i>	
1. As to	427
<i>Executive Mansion—</i>	
1. Disbursing agent, as to	414
<i>Expenditures—</i>	
1. And receipts of public moneys	409

F.

<i>Files—</i>	
1. Subdivision of, in the office of the Register of the Treasury	421
<i>Fractional Currency—</i>	
1. As to	410

G.

<i>Geodetic Survey—</i>	
1. As to	413
<i>Gold Certificates—</i>	
1. As to	409
<i>Government Bonds—</i>	
1. Issuing and transferring	409
<i>Government Property—</i>	
1. Warrants covering proceeds of	409
<i>Governors of Territories—</i>	
1. As to	414

H.

<i>House of Representatives—</i>	
1. Clerk of, as to	413

I.

	Page.
<i>Independent Treasury—</i>	
1. As to.....	413
<i>Indians and Pensions Appropriation—</i>	
1. Ledger, as to.....	420
<i>Indian Tribes—</i>	
1. Securities deposited in trust for certain	402
<i>Indorsement—</i>	
1. Upon warrants.....	401
<i>Internal-Revenue Appropriation Ledger—</i>	
1. As to.....	420
<i>Internal-Revenue Personal Ledger—</i>	
1. As to.....	417
<i>Internal-Revenue Stamp Ledger—</i>	
1. As to	417
<i>Interest Checks—</i>	
1. As to.....	409
<i>Interior Appropriation Ledger—</i>	
1. As to.....	420
<i>Interior Civil Personal Ledger—</i>	
1. As to.....	416
<i>Issues—</i>	
1. Division of, in the office of the Treasurer of the United States, as to....	406

J.

<i>Joint Library Committee—</i>	
1. Agent of, as to.....	413
<i>Judiciary and Diplomatic Appropriations Ledger—</i>	
1. As to	419
<i>Judiciary Personal Ledger—</i>	
1. As to.....	415

L.

<i>Ledger Accounts—</i>	
1. With holders of registered bonds.....	409
<i>Ledger—</i>	
1. Civil or Treasury appropriation, as to.....	419
2. Customs appropriation, as to.....	419
3. Customs personal, as to.....	416
4. Decedents' estate trust fund, as to.....	415
5. Diplomatic personal, as to.....	415
6. Indians and pensions appropriation, as to.....	420
7. Interior appropriation, as to.....	420
8. Interior civil personal, as to.....	416
9. Internal-revenue appropriation, as to	420
10. Internal-revenue personal, as to.....	417
11. Internal-revenue stamp, as to.....	417
12. Judiciary and diplomatic appropriations, as to.....	419
13. Judiciary personal, as to.....	415
14. Military appropriation, as to.....	420
15. Navy appropriation, as to.....	421
16. Outstanding liabilities, as to	414
17. Public debt appropriation, as to.....	420
18. Public debt personal, as to	417

	Page.
<i>Ledgers—</i>	
1. Appropriation, as to.....	418
<i>Librarian of Congress—</i>	
1. As to.....	414
<i>License Books—</i>	
1. As to.....	427
<i>Loan—</i>	
1. Division of, in the office of the Register of the Treasury.....	422
<i>Loans—</i>	
1. Division of, in the office of the Treasurer of the United States, as to...	405

M.

<i>Margin Books—</i>	
1. As to.....	427
<i>Marine Documents—</i>	
1. As to.....	426
<i>Member of Congress—</i>	
1. A professional retainer is not an office. The Constitution, article 1, section 6, does not prohibit a person so employed from being a.....	431
2. Is a, an officer under the Government.....	442
<i>Military Appropriation Ledger—</i>	
1. As to.....	420
<i>Mints—</i>	
1. Superintendents of	413
<i>Moneys—</i>	
1. Of the District of Columbia, as to.....	402
2. Of the United States receiving and keeping	401
3. Receipt for payment of, at the Treasury.....	409

N.

<i>Names Changed Book—</i>	
1. As to.....	428
<i>National Banks—</i>	
1. Assessment and collection of taxes imposed upon	401
2. Designated as depositaries.....	401
3. Division of, in the office of the Treasurer of the United States, as to.....	407
4. In liquidation, redeeming circulating notes of.....	401
5. Securing circulating notes of.....	401
6. That have failed, as to.....	401
<i>National Bank Redemption Agency—</i>	
1. In office of the Treasurer of the United States, as to.....	407
<i>National Board of Health—</i>	
1. As to.....	414
<i>Navy Appropriation Ledger—</i>	
1. As to.....	421
<i>Navy Department—</i>	
1. Disbursing clerk, as to.....	412
<i>Note and Coupon—</i>	
1. Division of, in the office of the Register of the Treasury.....	424
<i>Numerical Registers—</i>	
1. As to.....	409

O.

	Page.
Office—	
1. A professional retainer is not an. The Constitution, article 1, section 6, does not prohibit a member of Congress from being so employed.....	431
2. As to acting members of Congress.....	446
3. As to duties of an.....	447
4. Of the Assistant Register of the Treasury.....	410
5. Of the Assistant Treasurer of the United States at Washington, establishment of.....	402
6. Of the District of Columbia sinking fund, as to.....	408
7. Of the Register of the Treasury, divisions in.....	410
8. Of the Register of the Treasury, when established.....	409
9. Of the Treasurer of the United States, duties of.....	401
10. Of the Treasurer of the United States, organization of.....	401
11. Of the Treasurer of the United States, when established.....	401
Official Book-keeper—	
1. Of the United States, the Register is practically the.....	409
Organization—	
1. Of the office of the Register of the Treasury.....	409
Outstanding Liabilities Ledger—	
1. As to.....	414
Pacific Railroad Companies—	
1. As to.....	414

P.

Payment—	
1. Of moneys at the Treasury, as to.....	409
Postal Revenues—	
2. As to.....	414
Postmaster-General—	
1. As to warrant drawn by.....	409
2. Warrants drawn by.....	402
Post-Office Department—	
1. As to.....	414
2. Disbursing clerk, as to.....	413
Post-Offices—	
1. As to.....	414
President—	
1. Of the United States, as to salary.....	414
Professional Retainer—	
1. A person employed by the Attorney-General under sections 363 and 366 of the Revised Statutes to assist district attorney is not an officer. Such employment is a. (See opinion Attorney-General Williams, June 6, 1874, 14 Op. Att. Gen., 406.....	431
2. Is not an office. The Constitution, article 1, section 6, does not prohibit a member of Congress from being so employed.....	431
Prohibitory Statutes—	
1. Relating to Congressmen.....	438
Propagation—	
1. Of food-fishes.....	414
Public Buildings and Grounds—	
1. United States Army officers in charge of.....	413
Public Debt Appropriation Ledger—	
1. As to.....	

	Page
<i>Public Debt Personal Ledger—</i>	
1. As to.....	417
<i>Public Moneys—</i>	
1. Accounts of the receipts and expenditures of.....	409
2. Subject to draft, as to.....	402
3. Securing safe-keeping and prompt payment of.....	401
<i>Public Printer—</i>	
1. As to.....	413
R.	
<i>Receipts and Expenditures—</i>	
1. Accounts of, as to.....	414
2. Division of, in the office of the Register of the Treasury.....	410
3. Of public moneys.....	409
<i>Receipts—</i>	
1. For moneys disbursed and received by Treasurer.....	401
<i>Record Books—</i>	
1. As to.....	427
<i>Record—</i>	
1. Of warrants, as to.....	401
<i>Redemption Agent—</i>	
1. Of national banks, United States Treasurer as.....	401
<i>Redemption—</i>	
1. Division of, in the office of the Treasurer of the United States, as to	406
<i>Refunding Certificates—</i>	
1. As to.....	410
<i>Register Books—</i>	
1. As to.....	427
<i>Registered Bonds—</i>	
1. Ledger accounts with holders of.....	409
<i>Register—</i>	
1. Of the Treasury, as to.....	409
2. Of the Treasury is practically the official book-keeper of the United States.....	409
3. Of the Treasury, warrants recorded by.....	401
4. Of transfer, authorities as to.....	409
<i>Register's Office—</i>	
1. Divisions in.....	410
<i>Representatives—</i>	
1. Disbursement of salaries and mileage of.....	402
<i>Requisitions—</i>	
1. Of Secretary of the Navy, as to.....	409
2. Of Secretary of War, as to.....	409
3. (Warrants) countersigned by Comptrollers.....	401
<i>Retainer—</i>	
1. A person employed by the Attorney-General under sections 363 and 366 of the Revised Statutes to assist a district attorney is not an officer. Such employment is a professional retainer. (See opinion Attorney-General Williams, June 6, 1874, 14 Op. Att. Gen., 406).....	431
2. A professional retainer is not an office. Such employment is not a contract within the meaning of sections 3739-3742 of the Revised Statutes.....	431
<i>Revised Statutes Construed—</i>	
1. The professional retainer of a member of Congress under section 366; and 366 is not a contract within the meaning of sections 3739-3742.....	431

	Page.
<i>Revised Statutes—</i>	
1. Section 301, Treasurer	200, 401
2. Section 303, Assistant Treasurer.....	402
3. Section 304, Acting Treasurer	402
4. Section 305, duties of the Treasurer	401, 403
5. Section 311, Treasurer's accounts.....	401, 403
6. Section 312, Register of the Treasury	409
7. Section 313, duties of the Register	409
8. Section 314, Assistant Register	410
9. Section 315, duties of Assistant Register.....	410
10. Section 363, retaining counsel to aid district attorneys.....	431
11. Section 366, oath special attorneys	432
12. Section 1763, double salaries	431, 440
13. Section 1765, extra allowances	432
14. Section 3593, public moneys, drafts.....	402
15. Section 3739, Congressmen, contracts.....	431, 432, 433
16. Section 3740, interest in contracts	432
17. Section 3741, contract, no member of Congress must have interest in....	432
18. Section 3742, Congressmen, contract, penalty	432
19. Section 4131, United States vessels	426
20. Section 4132, register of vessels	427
21. Section 4158, certificates of registry of vessels.....	409
22. Section 4180, foreign vessels.....	427
23. Section 4181, measurement of vessels.....	427
24. Section 4182, vessels, certificate of record.....	427
25. Section 4217, commissions to yachts	427
26. Section 4311, vessels of the United States.....	426
27. Section 4312, enrolment of vessels	419
28. Section 4320, license of vessels	426
29. Section 5133, national banks.....	41

S.

Salaries and Mileage—

1. Of Senators, Representatives, and Delegates.....	402
---	-----

Schedule—

1. Of redeemed coupons, as to.....	409
------------------------------------	-----

Schedules—

1. To accompany coupon bonds to destruction committee.....	409
--	-----

Secretaries of Territories—

1. As to	414
----------------	-----

Secretary of the Navy—

1. Requisitions of, as to.....	409
--------------------------------	-----

Secretary of the Senate—

1. As to.....	413
---------------	-----

Secretary of the Treasury—

1. Securities held in trust by	402
2. Warrants drawn by.....	401

Secretary of War—

1. Requisitions of, as to.....	409
--------------------------------	-----

Securities—

1. For certain Indian tribes held in trust by Treasurer of the United States.	402
2. Held in trust by Secretary of the Treasury.....	402

Senate—

1. Secretary of, as to.....	413
-----------------------------	-----

	Page.
<i>Senators—</i>	
1. Disbursement of salaries and mileage of.....	402
<i>Silver Certificates—</i>	
1. As to.....	410
<i>Sinking Fund—</i>	
1. Of the District of Columbia, as to.....	408
<i>Sold Foreign Book—</i>	
1. As to.....	428
<i>Statutes at Large—</i>	
1. Vol. 1, p. 65, Register of the Treasury.....	409
2. Vol. 1, p. 65, Treasurer's office.....	401
3. Vol. 2, p. 484, Congressmen, contracts.....	435
4. Vol. 2, p. 484, contracts.....	433
5. Vol. 5, p. 349, extra allowance.....	435
6. Vol. 5, p. 473, coupon bonds.....	425
7. Vol. 5, p. 510, extra allowance, appropriation.....	435
8. Vol. 5, p. 525, extra service, compensation.....	435
9. Vol. 5, p. 614, coupon bonds.....	425
10. Vol. 9, pp. 217, 447, coupon bonds.....	425
11. Vol. 9, p. 542, double offices and salaries.....	435
12. Vol. 10, p. 100, double salaries.....	440
13. Vol. 12, p. 129, coupon bonds.....	425
14. Vol. 12, p. 198, coupon bonds.....	425
15. Vol. 12, p. 259, coupon bonds.....	425
16. Vol. 12, p. 259, interest checks.....	425
17. Vol. 12, p. 313, coupon bonds.....	425
18. Vol. 12, p. 313, interest checks.....	425
19. Vol. 12, p. 345, coupon bonds.....	425
20. Vol. 12, p. 352, certificates of indebtedness.....	425
21. Vol. 12, p. 370, money securities.....	429
22. Vol. 12, p. 492, interest checks.....	425
23. Vol. 12, p. 656, Assistant Register.....	410
24. Vol. 12, p. 709, coupon bonds.....	425
25. Vol. 12, p. 709, interest checks.....	425
26. Vol. 12, p. 710, interest-bearing Treasury notes.....	425
27. Vol. 12, p. 710, loans, coupons.....	425
28. Vol. 12, p. 711, gold certificates.....	406, 425
29. Vol. 12, p. 761, Assistant Treasurer.....	402
30. Vol. 13, p. 13, coupon bonds.....	425
31. Vol. 13, p. 104, security for circulating notes.....	407
32. Vol. 13, p. 104, Treasurer, national banks.....	401
33. Vol. 13, p. 106, certificate, bonds on deposit.....	407
34. Vol. 13, p. 111, national banks.....	401
35. Vol. 13, p. 111, tax on banks.....	407
36. Vol. 13, p. 112, circulating notes.....	401
37. Vol. 13, p. 113, bonds of national banks.....	407
38. Vol. 13, p. 113, depositaries.....	401
39. Vol. 13, p. 114, national banks.....	401
40. Vol. 13, p. 123, contract, claim, Congressmen.....	435
41. Vol. 13, p. 218, coupon bonds.....	425
42. Vol. 13, p. 359, interest checks.....	425
43. Vol. 13, p. 468, bonds, loans.....	179
44. Vol. 13, p. 468, coupon bonds.....	425
45. Vol. 14, p. 558, certificates of indebtedness.....	425
46. Vol. 15, p. 226, loans, coupons.....	425

	Page.
<i>Statutes at Large</i> —Continued.	
47. Vol. 16, p. 197, certificates of indebtedness.....	425
48. Vol. 16, p. 197, loans, coupons	425
49. Vol. 16, p. 272, coupon bonds.....	425
50. Vol. 16, p. 272, interest checks.....	426
51. Vol. 16, p. 399, coupon bonds	425
52. Vol. 17, p. 86, loans, coupons	425
53. Vol. 17, p. 336, certificates of deposit	403
54. Vol. 17, p. 336, certificates of indebtedness	425
55. Vol. 17, p. 336, currency certificates	406
56. Vol. 18, p. 43, coupon bonds	425
57. Vol. 18, p. 120, coupon bonds	425
58. Vol. 18, p. 120, interest checks	426
59. Vol. 18, p. 123, redemption agency	407
60. Vol. 18, p. 123, redemption agent	401
61. Vol. 18, p. 332, coupon bonds	425
62. Vol. 18, p. 332, interest checks	426
63. Vol. 18, p. 397, organization Treasurer's office	402
64. Vol. 18, p. 398, organization Treasurer's office	402
65. Vol. 18, p. 399, organization Treasurer's office.....	402
66. Vol. 18, p. 505, District accounts, deposits.....	401
67. Vol. 19, p. 58, custodian of securities for Indian tribes	402
68. Vol. 20, p. 106, pay of street contractors.....	408
69. Vol. 20, p. 107, District sinking fund.....	402
70. Vol. 21, p. 9, interest checks	426
71. Vol. 21, p. 9, loans, coupons	425
72. Vol. 21, p. 377, names and numbers of vessels	428
73. Vol. 21, p. 466, redemption board of audit certificates	408
74. Vol. 22, p. 108, salaries, &c., Congressmen	402
<i>Superintendent</i> —	
1. Of mints, as to.....	413
<i>Supreme Court of the United States</i> —	
1. As to.....	414
T.	
<i>Tax</i> —	
1. Imposed upon national banks, assessment and collection of.....	401
<i>Territories</i> —	
1. As to.....	414
<i>Tonnage</i> —	
1. Division of, in the office of the Register of the Treasury.....	426
<i>Treasurer</i> —	
1. Duties of Commissioners of the sinking fund of the District of Columbia, transferred to	402
2. Of the United States, as to.....	413
3. Of the United States, as to tax imposed on national banks.....	401
4. Of the United States, duties of office of.....	401
5. Of the United States, holds in trust securities for certain Indian tribes.	402
6. Of the United States, organization of office of.....	401
7. Of the United States, redemption agent of national bank.....	401
8. Receipts for moneys disbursed and received by	401
<i>Treasurers</i> —	
1. Of charitable institutions of District of Columbia	414
<i>Treasury Appropriation Ledger</i> —	
1. As to.....	419

	Page.
<i>Treasury Department—</i>	
1. Disbursing clerks, as to.....	412
<i>Treasury Personal Ledger—</i>	
1. In the Register's office, as to.....	412
<i>Trustee—</i>	
1. For certain Indian tribes, as to.....	402
<i>Trust-Fund Ledger—</i>	
1. Decedents' estates, as to.....	415

U.

<i>United States Army Officers—</i>	
1. In charge of public buildings and grounds.....	413
<i>United States Coast Survey—</i>	
1. Disbursing agent of, as to.....	413
<i>United States House of Representatives—</i>	
1. Clerk of, as to.....	413
<i>United States Money—(See Money.)</i>	
<i>United States Senate—</i>	
1. Secretary of, as to	413
<i>United States Treasurer—(See Treasurer of the United States.)</i>	
2. As to.....	413

V.

<i>Vessels Abandoned Book—</i>	
1. As to.....	427
<i>Vessels Built Books—</i>	
1. As to.....	427
<i>Vessels Lost Book—</i>	
1. As to.....	427
<i>Vessels Wrecked Book—</i>	
1. As to.....	427
<i>Vouchers—</i>	
1. And certificates of accounts, disposition of	409

W.

<i>War Department—</i>	
1. Disbursing clerk, as to.....	412
<i>Warrants—</i>	
1. Drawn by Postmaster-General.....	402
2. Drawn by the Secretary of the Treasury	401
3. For the receipt or payment of money at the Treasury	409
4. Indorsements upon.....	401
5. Recorded by the Register of the Treasury	401
6. Register's record of.....	409
7. (Requisitions) countersigned by Comptrollers.....	401

NOTE.—The foregoing indexes were prepared by Thomas Robinson, Esq., of the First Comptroller's Office.





